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PETITION AND TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 704

THE UNITED STATES, PETITIONER

vs.

BARNIM KOMBST, GERTRUDE LUCKHARDT, ILKA WICHMANN, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED FEBRUARY 13, 1932

CERTIORARI GRANTED MARCH 21, 1932

(36518)

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1 In Supreme Court of the United States

October term, 1931

No. 704

THE UNITED STATES, PETITIONER

v.

BARNIM KOMBST, GERTRUDE LUCKHARDT, ILKA WICHMANN, AND Howard Sutherland, Alien Property Custodian

Petition for a writ of certiorari to the Court of Claims

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above case of January 27, 1932. The opinion of the court below is reported in 52 F. (2d) 1030. The jurisdiction of this court is invoked under section 3 (b) of the act of February 13, 1925.

STATUTES INVOLVED

Section 203 of the revenue act of 1916 (c. 463, 39 Stat. 756, 778) provides in part:

"SEC. 203. That for the purpose of the tax the value of the net estate shall be determined—

"(a) In the case of a resident, by deducting from the value of the gross estate—

"(1) Such amounts for funeral expenses, administration expenses, claims against the estate * * * and such other
2 charges against the estate, as are allowed by the laws of the jurisdiction * * * under which the estate is being administered; * * *."

Section 1113 of the revenue act of 1926 (c. 27, 44 Stat. 9, 116) provides in part:

"SEC. 1113. (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

"'SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress.'"

Section 1316 of the revenue act of 1921 (c. 136, 42 Stat. 227, 314) provides:

"SEC. 1316. That section 3228 of the Revised Statutes is amended to read as follows:

"'SEC. 3228. All claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within four years next after payment of such tax, penalty, or sum.'

"This section, except as modified by section 252, shall apply retroactively to claims for refund under the revenue act of 1916, the revenue act of 1917, and the revenue act of 1918."

This provision was reenacted without change so far as is here important by section 1012 of the revenue act of 1924 (c. 234, 43 Stat. 253, 342) and by section 1112 of the revenue act of 1926 (c. 27, 44 Stat. 9, 115).

STATEMENT

This suit was originally brought in the Court of Claims by the residuary legatees of the estate of Rosa von Zimmermann, a German alien, who died testate at her residence in Pasadena, Cali-
3 fornia, on April 25, 1917, to recover an alleged overpayment of the Federal estate tax on the ground that the amount paid by way of inheritance tax to the State of California should have been allowed as a deduction from the gross estate. The executors of the estate, both of whom were citizens of the United States, acting under letters testamentary issued by the Superior Court of the State of California for the County of Los Angeles, filed a Federal estate-tax return under the Revenue Act of 1916, on April 19, 1918, and on the same day paid the amount of tax shown thereon. (Findings 1, 5.) On August 10, 1918, the Commissioner of Internal Revenue assessed an additional tax, which was paid on September 10, 1918. (Finding 6.) The California inheritance tax was paid by the executors on October 23, 1918. (Finding 7.) No deduction for this inheritance tax was made in the return filed or in the determination by the commissioner. (Finding 8.)

The residuary legatees, respondents herein, were residents and citizens of Germany. (Finding 3.) On June 12, 1918, the Alien Property Custodian, acting under the authority of the trading with the enemy act of October 6, 1917, and the Executive orders issued thereunder, notified the executors to convey, transfer, assign, deliver, and pay to him all the right, title, and interest of the residuary legatees in the estate. (Finding 4.) No further action was taken by the Alien Property Custodian until September 29, 1922, when he filed a petition in the proper State court requesting distribution of the estate. On October 26, 1922, the court ordered distribution, and the residue of the estate was delivered and paid over to the

Alien Property Custodian. (Finding 9.) On the same date
4 the executors, having rendered a final account, were discharged. (Finding 2.)

On December 27, 1923, the residuary legatees filed a claim for refund on the sole ground that certain assets of the gross estate had been overvalued, and on January 31, 1924, the Alien Property Custodian filed a claim on the same ground. (Finding 10.)

On November 23, 1925, the Commissioner of Internal Revenue was advised by letter on behalf of the residuary legatees and the Alien Property Custodian that refund was also claimed on the ground that the sum paid to the State of California by way of inheritance tax should have been allowed as a deduction from the gross estate for the purposes of the Federal estate tax. On January 7, 1926, more than seven years after the Federal estate tax was paid, the Alien Property Custodian filed a formal claim for refund on the same ground. (Finding 10.) This claim was rejected by the commissioner on July 11, 1928, for the stated reason that under the laws of California the State inheritance tax is not a charge against the estate within the meaning of section 203 of the revenue act of 1916. (Finding 11.)

Suit was instituted by the residuary legatees on December 18, 1928. The Court of Claims held on November 2, 1931, that the claim for refund filed by the Alien Property Custodian on January 7, 1926, was timely, and that the residuary legatees were entitled to recover the sum of $23,563.03, which it ordered to be paid with interest to the Alien Property Custodian "to be administered according to law." On January 26, 1932, respondents filed a motion for leave to file an amended petition joining the Alien Property Custodian as a party plaintiff. On January 27, 1932, the Court of Claims allowed the motion, entered an order vacating its former judgment, and rendered judgment in favor of respondents.

5 QUESTIONS PRESENTED

1. Whether a claim for refund filed by the Alien Property Custodian on January 7, 1926, more than four years after final payment of the estate tax, was barred by the provisions of section 3228 of the Revised Statutes, as amended by section 1316 of the revenue act of 1921, and subsequent revenue acts.

2. Whether the amount paid to the State of California under the California inheritance tax act of 1913 was a lawful deduction from the gross estate under section 203 (a) (1) of the revenue act of 1916.

SPECIFICATION OF ERRORS

The Court of Claims erred—

1. In holding that the Alien Property Custodian acquired immediate possession of the residuary legatees' interest in the estate by virtue of the notice to the executors dated June 12, 1918, in spite of

the fact that he did not take physical possession of any part of the estate until 1922.

2. In holding that the enemy status of the residuary legatees prevented the executors from filing a claim for refund.

3. In holding that the refund claim filed by the Alien Property Custodian on January 7, 1926, was timely.

4. In holding that the inheritance tax paid to the State of California under the California inheritance tax act of 1913 was a charge upon the estate within the meaning of section 203 (a) (1) of the revenue act of 1916, which could be deducted from the value of the gross estate in determining the Federal estate tax.

5. In rendering judgment in favor of respondents.

REASONS FOR GRANTING THE WRIT

6 1. The Court of Claims erred in holding that the claim for refund filed by the Alien Property Custodian on January 7, 1926, was filed in time to permit the maintenance of this action.

In so holding the court proceeded upon three assumptions which, we submit, were erroneous: (a) That the Alien Property Custodian obtained constructive possession of the residuary legatees' interest in the estate in 1918; (b) that the enemy status of the residuary legatees prevented the executors from filing a refund claim; and (c) that the statute of limitations relating to tax refunds is not applicable to the Alien Property Custodian. We submit that the limitations contained in section 1316 of the revenue act of 1921 are applicable and that this suit was barred by failure to file a claim for refund based upon the payment of the California inheritance tax within four years after payment of the Federal estate tax.

The notice which the Alien Property Custodian served upon the executors in 1918 gave him no greater rights than the residuary legatees had, and did not entitle him to possession until the extent of their interest had been determined. (Kahn v. Garvan, 263 Fed. 909 (S. D. N. Y.); Miller v. Rouse, 276 Fed. 715 (S. D. N. Y.); Isenberg v. Trent Trust Company, 26 F. (2d), 609, 613 (C. C. A. 9th).) This was recognized by the Alien Property Custodian, who did not attempt to obtain possession from the executors but applied to the State Probate Court for distribution and acquired possession only under the decree of distribution. Before such distribution the executors continued in the management and settlement of the estate as a whole, and it was their duty to secure refund of any taxes overpaid by them. It seems clear that they alone would have been recognized by the Commissioner of Internal Revenue as the proper parties

7 to file a claim. (See Regulations 37 (1919 and 1921 eds.), arts. 106, 110.) The record shows that the executors had access to the courts for the purpose of probating the will, administering the estate, and settling their accounts. (See Riddell v. Fuhrman, 232 Mass. 69.) The successful prosecution of a claim for refund would

not have brought "aid and comfort" to the enemy. (Birge-Forbes Company v. Heye, 251 U. S. 317, 323; Sutherland v. Mayer, 271 U. S. 272, 287.) It follows that the executors might have filed a refund claim within the period during which they administered the estate. The statutory bar contained in section 1316 of the revenue act of 1921 had fallen when the decree of distribution was entered by the California court. We submit that failure of the executors to file a claim within the statutory period precludes recovery by the beneficiaries or any other party, including the Alien Property Custodian.

2. The Court of Claims held that the statute of limitations does not apply to the Alien Property Custodian, because he is an officer of the United States. We believe that, for the reasons previously stated, the filing of a claim for refund was barred before the custodian obtained possession of the property of the residuary legatees, so that the question of the applicability of limitations to him is quite irrelevant. But even if that question is involved, we submit that the decision of the Court of Claims on this question was erroneous and contrary to the settled practice of the Treasury Department. Section 24 of the trading with the enemy act, as amended by section 18 of the settlement of war claims act of March 10, 1928 (c. 167, 45 Stat. 254, 276), provides for the extension of the statutory period of limitations in certain specified cases. In the practice of the Treasury Department this has been construed as showing the intent of Congress that in all other cases the ordinary period of limitations is applicable, even though refund is sought by the Alien Property Custodian. (See G. C. M. 5000, VII–2 Cumulative Bulletin (July–Dec., 1928), 176.) We believe that this construction was correct and that, if the question can be considered in this case, the custodian, like the residuary legatees, was barred by failure to file claim for refund within the statutory period. We are informed that numerous claims for refund have been rejected on this ground and that there are now pending in the Bureau of Internal Revenue several cases involving this question.

3. If, for any reason, the suit was not barred because claim for refund was not filed in time and the suit can be determined on the merits, the decision of the Court of Claims regarding the deductibility from the gross estate of the California inheritance tax appears to disregard the construction placed upon the California statute by the courts of California, and in so far as it does so the decision is in conflict with the decision of this court in Keith v. Johnson (271 U. S. 1), in which this court held that the determination of the State courts as to the character of State transfer taxes is to be accepted by the Federal courts.

The California inheritance tax of 1913 (Cal. Stats. 1913, p. 1066), under which the tax in question was imposed, and earlier California statutes similar in form, have been uniformly construed by the

highest court of that State as succession taxes, levied upon the right of the beneficiary to take the property bequeathed or devised. (Kennedy's Estate, 157 Cal. 517; Estate of Hite, 159 Cal. 392; Estate of Miller, 184 Cal. 674; Estate of Potter, 188 Cal. 56[illegible]) These
9 decisions clearly establish that the tax here involved is not a charge upon the estate within the meaning of section 203 (a) (1) of the revenue act of 1916. (See also Stebbins v. Riley, 268 U. S. 137, 143, 144; New York Trust Company v. Eisner, 256 U. S. 345.)

4. Although the question of the deductibility of State inheritance taxes from gross estates for the purpose of the Federal estate tax is no longer of general importance, since the revenue act of 1918 and subsequent acts specifically forbid the deduction of "estate, succession, legacy or inheritance taxes," nevertheless the question whether such taxes are charges upon the estate or upon the beneficiary frequently arises in connection with the determination of the net income upon which income tax must be paid by an executor or administrator under the revenue acts of 1916, 1918, 1921, 1924, and 1926. (See United States v. Mitchell, 271 U. S. 9.) In so far as the California tax alone is concerned there is some doubt whether the inheritance tax act of 1917 and later California statutes have so altered the State law as to make the tax a charge upon the estate. (See estate of Watkinson, 191 Cal. 591, 595; Estate of Letchworth, 201 Cal. 1.) But if we are correct in contending that the decision of the Court of Claims was erroneous, the case constitutes an unfortunate precedent for disregarding the applicable decisions of the State courts as to the nature and effect of State statutes imposing transfer taxes, and is to that extent in conflict with Keith v. Johnson, supra.

10 5. The case presents the same question as to the California inheritance tax as is involved with respect to the Massachusetts inheritance tax in Leach v. Nichols (No. 468, October term, 1931), now pending on a writ of certiorari to the Circuit Court of Appeals for the First Circuit. The Court of Claims decided the present case on the authority of its earlier decision in Merrill v. United States (66 C. Cls. 136), which is in direct conflict with the decision of the Circuit Court of Appeals for the First Circuit in the Leach case (50 F. (2d) 787).

CONCLUSION

Wherefore it is respectfully submitted that this petition should be granted.

THOMAS D. THACHER,
Solicitor General.

FEBRUARY, 1932.

11 In Court of Claims of the United States

No. J–679

BARNIM KOMBST, GERTRUDE LUCKHARDT, ILKA WICHMANN, AND Howard Sutherland, Alien Property Custodian

vs.

THE UNITED STATES

I. *Petition and amended petitions*

On December 18, 1928, the original petition was filed in the name of Barnim Kombst, Gertrude Luckhardt, and Ilka Wichmann.

On November 9, 1931, after the rendition of the judgment, the plaintiff, by leave of court, filed their amended petition to conform to the amount of the judgment of the court.

On January 27, 1932, by leave of court, the plaintiffs were allowed to file an amended petition by making Howard Sutherland, Alien Property Custodian, a party plaintiff. Said second amended petition is as follows:

II. *Second amended petition*

Filed January 27, 1932

Come now the plaintiffs, by Clarence W. De Knight, their attorney in fact, and respectfully show to the court:

1. That Rosa von Zimmermann died in Pasadena, California, on or about April 25, 1917, leaving a will dated December 29, 1916, making certain bequests, and devising and bequeathing to her sisters, Klara Kombst, Gertrude Luckhardt, and Ilka Wichmann, all the rest and residue of her estate, real, personal or mixed, share and share alike, and in the event of the death of either of them, the
12 share of such decedent to go to the legal heirs of such decedent, and naming as executors Joseph Friedlander and Walter F. Haas, of San Francisco, California.

2. That on or about May 14, 1917, letters testamentary were duly issued to Joseph Friedlander and Walter F. Haas by the Superior Court of the State of California in and for the County of Los Angeles, and after they rendered their final account, they were discharged on or about October 26, 1922.

3. That Barnim Kombst is the husband and sole heir of Klara Kombst, who died in August, 1921, and that he is a citizen of Germany residing in Credfeld, Germany; that Gertrude Luckhardt is an heir of Rosa von Zimmermann, deceased, and is a citizen of Germany residing in Charlottenburg, Germany; and that Ilka Wichmann is an heir of said decedent and is a citizen of Germany residing in Gorlitz, Silesia, Germany.

4. That on or about April 18, 1918, the Alien Property Custodian under the authority of the trading with the enemy act, approved October 6, 1917, and the Executive orders issued in pursuance thereof, made demand upon Joseph Friedlander and Walter F. Haas as executors of the last will and testament of Rosa von Zimmermann to convey, transfer, assign, deliver, and pay to him every right title, and interest of the said Klara Kombst, Gertrude Luckhardt, and Ilka Wichmann, who were at that time alien enemies, in and to the estate of Rosa von Zimmermann.

5. That pursuant to the revenue act of September 8, 1916, said executors on or about April 19, 1918, filed in the office of the United States collector of internal revenue at Los Angeles, California, a Federal estate-tax return for the said Rosa von Zimmermann,
13 deceased, showing a net estate for the purpose of the Federal estate tax of $1,861,152.35, and a tax of $138,908.51.

6. That subsequent to the filing of said return the Commissioner of Internal Revenue, on or about August 10, 1918, upon a review and audit thereof, increased the net estate for the purpose of the Federal estate tax to $1,927,610.88, with a resultant additional tax liability of $5,981.27.

7. That on or about April 19, 1918, said executors paid to the United States collector of internal revenue at Los Angeles, California, the sum of $138,908.51, the tax disclosed by said return, and on or about September 10, 1918, said executors paid to said collector of internal revenue the sum of $5,981.27, as the additional tax determined and assessed by said Commissioner of Internal Revenue.

8. That on or about October 23, 1918, said executors paid to the proper officers of the State of California the sum of $261,811.42, as an inheritance tax an account of the estate of said decedent.

9. That neither the net estate returned by said executors, nor the net estate as finally determined by said commissioner, was computed by deducting from the gross estate of said decedent the sum of $261,811.42, or any part thereof, for inheritance taxes paid the State of California by said executors.

10. That on or about December 27, 1923, Barnim Kombst, Gertrude Luckhardt, and Ilka Wichmann filed claims for refund with the Commissioner of Internal Revenue, which claims were based on the contention that the gross estate was overhauled, and on or about January 31, 1924, the Alien Property Custodian filed a claim for refund with the Commissioner of Internal Revenue based on
14 the same contention; that on or about November 23, 1925, the Commissioner of Internal Revenue was advised on behalf of the Alien Property Custodian and heirs of Rosa von Zimmermann, deceased, that claim was made also on the ground that the sum of $261,811.42 paid to the State of California for inheritance taxes should have been allowed as a deduction from the value of the gross estate in computing the net estate subject to the Federal estate tax; that on or about January 7, 1926, the Alien Property Custodian filed a formal claim for refund with the Commissioner of Internal

Revenue based on the contention that the sum of $261,811.42 paid to the State of California for inheritance taxes should be deducted from the gross estate of said decedent in computing the net estate subject to the Federal estate tax.

11. That on or about July 11, 1928, said Commissioner of Internal Revenue rejected said claim, based on the contention that the sum of $261,811.42 paid to the State of California as inheritance tax should have been allowed as a deduction, by letter to the Alien Property Custodian as follows:

"The bureau has examined the claim filed by you on behalf of the above-named estate for refund of Federal estate tax paid under the provisions of the revenue act of 1916 as amended by the act of March 3, 1917. The question presented was whether the amount paid by the executor of the estate in satisfaction of the California inheritance tax is deductible from the decedent's gross estate in determining the net estate for tax.

"Section 203 of the revenue act of 1916 allows certain deductions to be made for the purpose of computing the value of the net estate for Federal estate-tax purposes. Among the deductions allowed are 'such other charges against the estate as are allowed by the laws of the jurisdiction * * * under which the estate is being administered.'

"The courts of the State of California have uniformly interpreted the inheritance tax as being imposed on the right of the beneficiary to succeed to the estate. The State inheritance tax is not imposed on the estate but constitutes a charge against the beneficiaries; therefore, it is not a proper deduction under section 203 of the revenue act of 1916. Accordingly, your claim for refund as herein referred to is rejected in its entirety."

12. That the action of the Commissioner of Internal Revenue in refusing to deduct from the gross estate of said decedent in computing the net estate for the purpose of the Federal estate tax the amount of inheritance tax paid to the State of California in the sum of $261,811.42, and in assessing and collecting the Federal estate tax upon the value of said net estate without allowing such deduction, and in rejecting the claim for refund as aforesaid, was erroneous and illegal, in that the revenue act of September 8, 1916, under which said estate was taxed, provides that the net estate of the decedent shall be determined by deduction from the gross estate, among other things, claims against the estate and such other charges against the estate as are allowed by the laws of the jurisdiction under which the estate is being administered, and under the laws of California said inheritance tax paid by said executors was a charge against the estate and a claim against the estate within the meaning of the Federal revenue act of 1916.

13. That in arriving at the amount of the Federal estate tax due from said estate, said commissioner erroneously and illegally, and without authority of law, calculated said tax upon the

alleged taxable net estate of $1,927,610.88, resulting in the assessment and collection of a tax in the sum of $144,889.78; that said commissioner in acting upon said claim thereafter erroneously and illegally, and without authority of law, refused to deduct from the gross estate of said decedent in arriving at the net estate for the purpose of the Federal estate tax the amount paid to the State of California as inheritance tax aforesaid. The entire sum of $261,811.42 paid as inheritance tax to the State of California should have been deducted from the gross estate resulting in a taxable net estate of $1,665,799.46, which would have resulted in the assessment and collection of a tax of $121,421.95 instead of $144,889.78.

14. That $23,563.03 was unlawfully exacted and retained as aforesaid by defendant from plaintiffs and is withheld at the cost and expense of the plaintiffs.

15. That on or about September 29, 1922, the Alien Property Custodian filed a petition for distribution of the said estate with the Superior Court of the State of California in and for the County of Los Angeles, and on or about October 26, 1922, the said court entered an order distributing the said estate in accordance with the will of the said decedent, and after the payment of the debts and bequests to persons other than the plaintiffs herein, the residue of the estate devised and bequeathed to the plaintiffs under the will of said decedent was distributed to the Alien Proper Custodian.

16. That plaintiffs are the sole owners of the claim herein sued upon, and that no assignment or transfer of the claim or any part thereof or any interest therein has been made; that under and
17 by virtue of the laws of Germany, citizens of the United States are accorded the right to prosecute claims against Germany in its courts; that plaintiffs have not in any way voluntarily aided, abetted, or given encouragement to rebellion against the Government of the United States; and that plaintiffs believe the facts as stated in this petition to be true.

Wherefore plaintiffs pray judgment against the defendant in the sum of $23,563.03 with interest at the rate of six per cent per annum on $17,581.76 from April 19, 1918, and on $5,981.27 from September 10, 1918.

BARNIM KOMBST,
GERTRUDE LUCKHARDT,
ILKA WICHMANN,
By CLARENCE W. DE KNIGHT,
Their Attorney in Fact.

Signed HOWARD SUTHERLAND,
Alien Property Custodian.

18 [*Duly sworn to by Clarence W. De Knight and Howard Sutherland; jurats omitted in printing.*]

19 III. *General traverse*

Filed Jan. 26, 1929

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimants herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

HERMAN J. GALLOWAY,
Assistant Attorney General.

IV. *Argument and submission of case*

On October 15 and 16, 1930, this case was argued and submitted on merits by Mr. Frederick Schwertner, for plaintiffs, and by Mr. Fred K. Dyar, for defendant.

20 V. *Special findings of fact, conclusion of law, and opinion of the court, by Whaley, J.*

Filed November 2, 1931

Mr. Frederick Schwertner for the plaintiffs. Mr. Clarence W. DeKnight was on the briefs.

Mr. Fred K. Dyar, with whom was Mr. Assistant Attorney General Charles B. Rugg for the defendant. Mr. William T. Sabine, jr., was on the brief.

This is a suit to recover Federal estate taxes in the sum of $23,563.03, together with interest thereon, and the basis of the action is the refusal of the Commissioner of Internal Revenue to allow as a deduction from the gross estate in arriving at the net estate subject to tax the sum of $261,811.42 paid to the proper officers of the State of California as an inheritance tax under the laws of the said State. The decedent, Rosa von Zimmerman, died on April 25, 1917, and Federal estate taxes were paid under the revenue act of 1916, as amended.

This case having been heard by the Court of Claims, the court, upon the stipulation of facts entered into by the parties, makes the following

SPECIAL FINDINGS OF FACT

1. Rosa von Zimmermann, a resident of the United States, died in Pasadena, California, on or about April 25, 1917, leaving a will dated December 29, 1916, making certain bequests, and devising and bequeathing to her sisters, Klara Kombst, Gertrude Luckhardt, and Ilka Wichmann, all the rest and residue of her estate, real, personal,

or mixed, share and share alike, and in the event of the death of either of them, the share of such decedent to go to the legal heirs of such decedent, and naming as executors Joseph Friedlander and Walter F. Haas, citizens of the United States and residents of San Francisco, California. Rosa von Zimmermann at the time of her death was a German alien enemy.

2. On or about May 14, 1917, letters testamentary were duly issued to Joseph Friedlander and Walter F. Haas by the Superior Court of the State of California in and for the County of Los Angeles. They qualified and acted as executors of the said estate of Rosa von Zimmerman, deceased, and after the payment of debts and bequests to persons other than the plaintiffs herein, they rendered their final account to the said Court and were discharged on or about October 26, 1922.

21 3. Klara Kombst died in Germany on August 16, 1917, and at the time of her death was an alien enemy. She left surviving her as her sole heir, her husband, Barnim Kombst, who is a citizen of Germany, residing at Kassel, Germany, Kirchweg 84. Gertrude Luckhardt is an heir of Rosa von Zimmermann, deceased, and is a citizen of Germany residing at Berlin, Dahlem, Germany, Schorlemer, Allee 17a. Ilka Wichmann is an heir of said decedent and is a citizen of Germany residing at Gorlitz, Silesia, Germany. These parties were at all times during the World War alien enemies resident in Germany.

4. On June 12, 1918, the Alien Property Custodian under authority of the trading with the enemy act, approved October 6, 1917, and the Executive orders issued in pursuance thereof, served a notice and demand upon Joseph Friedlander and Walter A. Haas as executors of the said estate of Rosa von Zimmermann, deceased, to convey, transfer, assign, deliver and pay to him every right, title, and interest of the said Gertrude Luckhardt in and to the estate of Rosa von Zimmerman, deceased. A copy of the said notice and demand is attached to the stipulation marked "Exhibit A" and made a part hereof by reference. A similar notice and demand was served by the Alien Property Custodian on the said executors on June 12, 1918, covering the right, title, and interest of Ilka Wichmann and Klara Kombst in and to the said estate.

5. Pursuant to the revenue act of September 8, 1916, said executors on or about April 19, 1918, filed with the collector of internal revenue at Los Angeles, California, a Federal estate-tax return for the estate of Rosa von Zimmermann, deceased, showing a net estate for the purpose of the Federal estate tax of $1,861,152.35, and a tax of $138,908.51, which tax was paid by the said executors to the said collector on April 19, 1918.

6. Upon a review and audit of said return, the Commissioner of Internal Revenue increased the net estate to $1,927,610.88 and assessed an additional tax of $5,981.27, which ws paid by said executors to the said collector of internal revenue on September 10, 1918.

7. On October 23, 1918, said executors paid to the proper officers of the State of California the sum of $261,811.42 out of said estate as an inheritance tax under the laws of California on the estate of said decedent.

8. Neither the net estate returned by said executors nor the net estate as finally determined by the Commissioner of Internl Revenue was computed by deducting from the gross estate of said decedent the sum of $261,811.42, paid by said executors as inheritance taxes under the laws of the State of California.

9. On September 29, 1922, the Alien Property Custodian filed a petition for distribution of the said estate with the Superior Court of the State of California in and for the County of Los Angeles, and on October 26, 1922, the said court entered an order distributing the said estate in accordance with the will of the said decedent, and after the payment of debts and bequests to persons other than the plaintiffs herein, the residue of the estate devised and bequeathed to the plaintiffs was conveyed, transferred, assigned, delivered, and paid over to the Alien Property Custodian.

10. On December 27, 1923, Barnim Kombst, Gertrude Luckhardt, and Ilka Wichmann filed claims for refund in the sum of
22 $25,000.00 each with the Commissioner of Internal Revenue, which claims were based on the contention that certain foreign securities and other property were overvalued, and on January 31, 1924, the Alien Property Custodian filed a claim for refund in the sum of $75,000.00 with the said commissioner based on the same contention. On November 23, 1925, the said commissioner was advised by letter on behalf of the Alien Property Custodian and the plaintiffs herein that claim for refund was also made on the ground that the sum of $261,811.42 paid to the State of California for inheritance taxes should have been allowed as a deduction from the value of the gross estate in computing the net estate subject to the Federal estate tax. On January 7, 1926, a formal claim for refund was filed with the said commissioner based on the contention that the sum of $261,811.42 paid to the State of California for inheritance taxes should have been allowed as a deduction from the gross estate of the said decedent in computing the net estate subject to the Federal estate tax. A copy of said claim for refund is attached to the stipulation marked "Exhibit B" and is made a part hereof by reference.

11. On July 11, 1928, said commissioner rejected said claim for refund as to the contention that the sum of $261,811.42 paid to the State of California as inheritance tax should have been allowed as a deduction, by letter as follows:

"The bureau has examined the claim filed by you on behalf of the above-named estate for refund of Federal estate tax paid under the provisions of the revenue act of 1916 as amended by the act of March 3, 1917. The question presented was whether the amount paid by the executor of the estate in satisfaction of the California inheritance tax is deductible from the decedent's gross estate in determining the net estate for tax.

"Section 203 of the revenue act of 1916 allows certain deductions to be made for the purpose of computing the value of the net estate for Federal estate-tax purposes. Among the deductions allowed are 'such other charges against the estate as are allowed by the laws of the jurisdiction * * * under which the estate is being administered.'

"The courts of the State of California have uniformly interpreted the inheritance tax as being imposed on the right of the beneficiary to succeed to the estate. The State inheritance tax is not imposed on the estate but constitutes a charge against the beneficiaries; therefore, it is not a proper deduction under section 203 of the revenue act of 1916. Accordingly, your claim for refund as herein referred to is rejected in its entirety."

12. Should it be determined that the said sum of $261,811.42 paid to the State of California as inheritance tax is a proper deduction from the gross estate of said decedent, Federal estate taxes were overpaid in the sum of $23,563.03.

CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiffs are entitled to recover the sum of $23,563.03.

It is therefore adjudged and ordered that the plaintiffs recover of and from the United States the sum of twenty-three
23 thousand five hundred sixty-three dollars and three cents ($23,563.03), with interest at the rate of six per cent per annum on $17,581.76 from April 19, 1918, and on $5,981.27 from September 10, 1918, to such date as the Commissioner of Internal Revenue may determine in accordance with the provisions of subsection (b), section 177, of the Judicial Code, being a part of the revenue act of 1928, to be delivered to the Alien Property Custodian to be administered according to law.

OPINION

WHALEY, Judge, delivered the opinion of the court:

The facts in this case, which were stipulated, disclose that the property of the plaintiffs was seized, confiscated and impounded by the President of the United States, acting through the Alien Property Custodian, and at the present time the corpus of the legacies is still held by him and can not be returned to them until further legislative enactment by Congress. (Trading with the enemy act, Oct. 6, 1917, c. 106, 40 Stat. 411, amended March 28, 1918, c. 28, 40 Stat. 459, 460; Nov. 4, 1918, c. 201, 40 Stat. 1020; July 11, 1919, c. 6, 41 Stat. 35; June 5, 1920, c. 241, 41 Stat. 977.)

What part, if any, has been returned to them, under the act of March, 1923 (42 Stat. 1511, c. 285), and the act of 1928 (45 Stat. 254, c. 167), the record does not disclose and is immaterial to the case

before us. The Alien Property Custodian took over all the right, title, and interest of these plaintiffs in 1918 and has ever since remained in control and possession.

The tax in question was paid in October, 1918, by the executors of the estate after notice to them by the custodian of the confiscation. Actual possession of the property by the Alien Property Custodian was had in 1922. Upon the notification to the executors by the custodian, under the terms of the act, he succeeded to all the rights in the property to which the alien enemies were entitled as completely as if by conveyance, transfer, or assignment. (Commercial Trust Co. v. Mille 262 U. S. 56; Central Trust Co. v. Garvan, 254 U. S. 554.) Th funds have been ever since, and are now, in the possession and co l, subject to the acts of Congress, of an agent of the defendant. The refund claim by the custodian was not filed until January 7, 1926, eight years after the payment of the tax, and more than four years after the declaration of peace on July 2, 1921. The Commissioner of Internal Revenue rejected the claim on July 11, 1928. It is contended by the defendant that under sec. 1316 of the revenue act of 1921, amending sec. 3228, Rev. Stat., all claims for refund of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any sum alleged to have been excessive, must be presented to the commissioner within four years after payment of such tax or sum. If this limitation of four years applies, the claim which has been filed by the custodian can not afford the basis of any refund, since it was filed subsequent to the expiration of the four year period. Does the bar interposed by sec. 1316 apply to a refund claim filed by an agent of the Government? There can be no question the executors could not have filed a claim for refund in behalf of alien enemies. (Borovitz v. American Hard Rubber Co., 287 Fed. 368; Crawford et al. v. Wm. Penn, Fed. Cases, No. 3372, 6 Fed. Cases 779; Sierra v. United
24 States, 9 C. Cls. 224.) The plaintiffs, being alien enemies, could not file a claim during the period of the war, and since the declaration of peace in July, 1921, having no right to the corpus of the estate, could not file a claim for refund within the statutory period. (Stoehr v. Wallace, 255 U. S. 239.) It is unnecessary to decide whether the statute has ever begun to run against plaintiffs. If there is a refund allowed it must be paid to the custodian, who is now in control of the corpus. Does the statute of limitations apply to the custodian who holds the property of the plaintiffs, subject to the direction of the Congress? The custodian is the representative of the Government.

In United States v. Nashville & Ry. Co. (118 U. S. 120, 125) it is held: "It is settled beyond doubt or controversy—upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided—that the United States asserting rights vested

in them as a sovereign government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound." (See also United States v. Whited & Wheless, 246 U. S. 552, 561.)

In DuPont De Nemours & Co. v. Davis, Director General of Railroad (264 U. S. 456, 462), the Supreme Court said: "In taking over and operating the railroad system of the country the United States did so in its sovereign capacity, as a war measure * * *. An action by the director general to recover upon a liability arising out of such control is an action on behalf of the United States in its governmental capacity, * * * and, therefore, is subject to no time limitation, in the absence of congressional enactment clearly imposing it."

It is manifest the bar of the provision of sec. 1316 of the act of 1921 does not apply to the Alien Property Custodian, and therefore the refund claim was timely.

The next question which confronts us is whether the inheritance tax paid to the State of California is a charge against the estate, or against those who succeed to the estate. A similar question has been before the Supreme Court on several occasions involving the construction of the inheritance-tax statutes of the State of New York (United States v. Mitchell, 271 U. S. 9), and of the State of Texas (Keith, Collector, v. Johnson, Administrator, 271 U. S. 1). This court has had a case involving the construction of the inheritance-tax statute of the State of Massachusetts (*Merrill* v. *United States*, 66 C. Cls. 136). In all of these cases it has been held that the tax is a charge against the estate, and therefore deductible in the estate-tax return made to the Federal Government. We have carefully compared the statute of the State of California with the statutes of the other States involved in those cases. We can find no substantial differences. The value of the estate was fixed as of the time of the death of the testator; the tax is due and payable at the death of the decedent; the executors are made responsible for the payment of the tax; it must be paid in eighteen months, otherwise bond has to be given by the executors; no payment can be made to any heir or legatee until a receipt has been filed in court showing the payment of the tax, and other provisions are almost identical with the
25 statutes of the States we have mentioned before. The decisions of the courts of California as to whether this is a transfer or a succession tax are somewhat clouded. In one case they determine it a transfer tax (Estate of Potter, 188 Cal. 55); in another a succession tax; and in a third, a transfer and succession tax (Estate of Letchworth, 201 Cal. 1); but all of the cases are uniform in holding that the amount of the tax is based on the value of the estate at the time of the death of the testator and that the impairment of the estate by the executors does not reduce the amount of the tax which must be paid on the gross value of the estate at the time of death. (Estate of Hite, 159 Cal. 392.) We can see no difference between this

statute and that held in the case of United States v. Mitchell (supra); the case of Keith, Collector, v. Johnson, Administrator (supra); and the case decided by this court, Merrill v. United States (supra). We are therefore of the opinion that the amount paid from the estate of Rosa von Zimmermann to the State of California was a charge against the estate and was deductible from the estate tax paid to the Federal Government, and the refund claim should have been allowed by the Commissioner of Internal Revenue.

It is so ordered.

WILLIAMS, Judge; LITTLETON, Judge; GREEN, Judge; and BOOTH, Chief Justice, concur.

26 *Exhibit A*

Original

A. P. C. Form No. 106–N. Demand on fiduciary. Report No. 16250

Alien Property Custodian

Trust No. C–15801

DEMAND BY ALIEN PROPERTY CUSTODIAN FOR PROPERTY

Extracts from trading with the enemy act:

SEC. 7. (c). "If the President shall so require, any money or other property owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian."

SEC. 7 (e). "No person shall be held liable in any court for or in respect to anything done or omitted in pursuance of any order, rule, or regulation made by the President under the authority of this act.

"Any payment, conveyance, transfer, assignment, or delivery of money or property made to the Alien Property Custodian hereunder shall be a full acquittance and discharge for all purposes of the obligation of the person making the same to the extent of same. The Alien Property Custodian and such other persons as the President may appoint shall have power to execute, acknowledge, and deliver any such instrument or instruments as may be necessary or proper to evidence upon the record or otherwise such acquittance and discharge, and shall, in case of payment to the Alien Property Custodian of any debt or obligation owed to an enemy or ally of enemy, deliver up any notes, bonds, or other evidences of indebtedness or obligation, or any security therefor in which such enemy or ally of enemy had any right or interest that may have come into

the possession of the Alien Property Custodian, with like effect as if he or they, respectively, were duly appointed by the enemy or ally of enemy, creditor, or obligee."

Extracts from Executive order dated February 26, 1918:

SEC. 1. (c). "The words 'right,' 'title,' 'interest,' 'estate,' 'power,' and 'authority of the enemy, as used herein, shall be deemed to mean respectively such right, title, interest, estate, power, and authority of the enemy as may actually exist and also such as might or would exist if the existing state of war had not occurred, and shall be deemed to include respectively the right, title, interest, estate, power, and authority in law or equity or otherwise of any representative of or trustee for the enemy or other person claiming under or in the right of, or for the benefit of, the enemy."

SEC. 2 (a). "A demand for the conveyance, transfer, assignment, delivery, and payment of money or other property unless expressly qualified or limited shall be deemed to include every right, title, interest, and estate of the enemy in and to the money or other property demanded as well as every power and authority of the enemy thereover."

SEC. 2 (c). "When demand shall be made and notice thereof given, as hereinbefore provided, such demand and notice shall forthwith vest in the Alien Property Custodian such right, title, interest, and estate in and to and possession of the money or other property demanded and such power or authority thereover as may be included within the demand, and the Alien Property Custodian may thereupon proceed to administer such money and other property in accordance with the provisions of the trading with the enemy act and with any orders, rules, or regulations heretofore, hereby, or hereafter made by me or heretofore or hereafter made by the Alien Property Custodian."

To JOSEPH FRIEDLANDER & WALTER F. HAAS,
As Executors of the Last Will & Testament of
Rosa Von Zimmerman, Deceased, % Joseph Friedlander,
Address, % Anglo-London-Paris National Bank,
San Francisco, Cal.

I, A. Mitchell Palmer, Alien Property Custodian, duly appointed, qualified, and acting under the provisions of the act of Congress known as the trading with the enemy act, approved October 6, 1917, and the Executive orders issued in pursuance thereof, by virtue of the authority vested in me by said act and said Executive orders, after investigation do determine that:

Gertrude Luckhardt, whose address is 124 Schiller St., Charlot-
(Name of enemy or ally of enemy) (Last known address)
tenburg, Germany, is an enemy (not holding a license granted by the President), and has a certain right, title, and interest in and to the estate of Rosa Von Zimmerman, deceased.
(To be here properly described)

I, as Alien Property Custodian, hereby require that every right, title, and interest of said enemy in and to the estate above described, including every power and authority thereover, shall be by you conveyed, transferred, assigned, delivered, and paid over to me, as Alien Property Custodian, to be by me held, administered, and accounted for as provided by law, and that any money or property now or hereafter held by you which the enemy may at any time or times, now or hereafter, be entitled to receive either upon or without demand, shall at such time or times be conveyed, transferred, assigned, delivered, and paid over to me, as Alien Property Custodian.

I, as Alien Property Custodian, hereby further require that you shall give to me, as Alien Property Custodian, every notice in respect to the said estate to which the said enemy may be entitled.

The Anglo-London-Paris Nat'l. Bank is hereby designated as depositary, and is authorized to receive, for and on behalf of the Alien Property Custodian, the property herein mentioned, and upon the service of this demand on you by said depositary, you are directed to deliver the said property to it forthwith. For money demanded, checks may be delivered to the depositary, which in all cases should be made payable to the Alien Property Custodian.

Witness my hand and seal of office this 18th day of April, 1918.

A. MITCHELL PALMER,
Alien Property Custodian,
By J. L. DAVIS,
Managing Director.
J. R. Z.

27 *Exhibit B*

(Execute separate form for each tax period)

(Treasury Department, Internal Revenue Service. Form 843—Jan., 1922
Comptroller General U. S. January 18, 1922)

IMPORTANT.—File with collector of internal revenue where assessment was made. Not acceptable unless completely filled in

CLAIM FOR

☐ ABATEMENT OF TAX ASSESSED
☐ CREDIT AGAINST OUTSTANDING ASSESSMENTS
☒ REFUND OF TAXES ILLEGALLY COLLECTED
☐ REFUND OF AMOUNTS PAID FOR STAMPS USED IN ERROR OR EXCESS

NOTICE TO COLLECTOR.—Collector must indicate in block above the kind of claim, except in income-tax cases.

COLLECTOR'S NOTATION.—District: ———. Account number: ——.
Date received (stamp here):
——— ———, *Collector of Internal Revenue.*

Date received by Administrative Unit (stamp here):

DISTRICT OF COLUMBIA, *ss:*

Alien Property Custodian (Estate of Rosa von Zimmerman),
(Name of taxpayer or purchaser of stamps)

Vermont Avenue and H Streets NW.,
(Residence—give street and number as well as city or town and State)

Washington, D. C.
(Business Address)

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

Period	Year
From:----------	19---.
To:----------	19---

1. Business in which engaged: Alien Property Custodian.
2. Character of assesssment or tax: Federal estate tax.
(State for or upon what the tax was assessed or the stamps affixed)
3. Amount of assessment or stamps purchased---------- $144,889.78
4. Reduction of tax liability requested (income and profits tax)-- $----------
5. Amount to be abated---------- $----------
6. Amount to be refunded (or such greater amount as is legally refundable)---------- $23,563.06
7. Dates of payment (see collector's receipts or indorsements of canceled checks: $138,908.51 on April 19, 1918; $5,981.27 on September 10, 1918.
(If statement covers income tax liability, items 8–11, inclusive, must be answered.)
8. District in which return (if any) was filed: Los Angeles, Calif.
9. District in which unpaid assessment appears:----------
10. Amount of overpayment claimed as credit---------- $----------
11. Unpaid assessment against which credit is asked:
Period from----------to---------- $----------

Deponent verily believes that this application should be allowed for the following reasons:

Rosa von Zimmerman died in Los Angeles, Calif., on April 25, 1917, and there was paid to the collector of internal revenue at Los Angeles, Calif., as Federal estate tax, the sum of $144,889.78. In filing the Federal estate-tax return, the executors failed to take as a deduction the sum $261,811.42, which was paid to John N. Hunt, Los Angeles Co., treasurer, representing the California inheritance tax. This sum was paid out of the estate, and under the revenue act of 1916, as amended by the 1917 act, constituted a "claim" or "charge" against the estate.

Oral hearing before the Solicitor of Internal Revenue is respectfully requested.

(Attach additional sheets if necessary)

(Signed) CLARENCE W. DE KNIGHT,
Attorney for Alien Property Custodian
in re Estate of Rosa von Zimmerman.

Power of attorney is on file.

Sworn to and subscribed before me this 7th day of Jan., 1926.
[SEAL.] CAESAR A. CARBALLO,
Notary Public, D. C.

(This affidavit may be sworn to before a deputy collector of internal revenue or revenue agent without charge)

28 VI. *Order of court of January 27, 1932, vacating judgment entered November 2, 1931 (findings and opinion to stand), allowing filing of second amended petition and entering new judgment*

It is ordered this 27th day of January, 1932, on the court's own motion that the judgment entered in this cause November 2, 1931, be, and the same is, vacated and set aside, the findings of fact and opinion to stand.

It is further ordered that the plaintiff motion filed January 26, 1932, asking leave to file a second amended petition naming Howard Sutherland, Alien Property Custodian, a party plantiff be, and the same is, allowed; and

It is further ordered that judgment be, and the same is this day, entered in favor of the plaintiffs, Barnim Kombst, Gertrude Luckhardt, Ilka Wichmann, and Howard Sutherland, Alien Property Custodian, in the sum of twenty-three thounsand five hundred sixty-three dollars and three cents ($23,563.03), with interest at the rate of six per cent per annum on $17,581.76 from April 19, 1918, and on $5,981.27 from September 10, 1918, to such date as the Commissioner of Internal Revenue may determine in accordance with the provisions of subsection (b), section 177, of the Judicial Code, being a part of the revenue act of 1928.

29 [Clerk's certificate to foregoing transcript omitted in printing.]

[Indorsement on cover:] File No. 36518. Cour of Claims. Term No. 704. The United States, petitioner, *vs.* Barnim Kombst, Gertrude Luckhardt, Ilka Wichmann, et al. Filed February 13, 1932. File No. 36518.

U. S. GOVERNMENT PRINTING OFFICE: 1932

Supreme Court of the United States

Order allowing certiorari

Filed March 21, 1932

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

No. 704

In the Supreme Court of the United States

OCTOBER TERM, 1931

THE UNITED STATES, PETITIONER

v.

BARNIM KOMBST, GERTRUDE LUCKHARDT, ILKA WICHMANN, AND HOWARD SUTHERLAND, ALIEN PROPERTY CUSTODIAN

ON A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 704

THE UNITED STATES, PETITIONER

v.

BARNIM KOMBST, GERTRUDE LUCKHARDT, ILKA WICHMANN AND HOWARD SUTHERLAND, ALIEN PROPERTY CUSTODIAN

ON A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 14–17) is reported in 52 F. (2d) 1030.

JURISDICTION

The judgment of the Court of Claims was entered on January 27, 1932. (R. 21.) The petition for a writ of certiorari was filed on February 13, 1932, and was granted on March 21, 1932. (R. 22.) The jurisdiction of this Court rests upon Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a claim for refund filed by the Alien Property Custodian on January 7, 1926, more than four years after final payment of the estate tax, was barred by the provisions of Section 3228 of the Revised Statutes, as amended by Section 1316 of the Revenue Act of 1921 and subsequent revenue Acts.

2. Whether the amount paid to the State of California under the California Inheritance Tax Act of 1913 was a lawful deduction from the gross estate under Section 203 (a) (1) of the Revenue Act of 1916.

STATUTES AND REGULATIONS INVOLVED

These are printed in the Appendices, *infra*, pp. 24–28.

STATEMENT

This suit was originally brought in the Court of Claims by the residuary legatees of the estate of Rosa von Zimmermann, a German alien, who died testate at her residence in Pasadena, California, on April 25, 1917 (R. 11), to recover an alleged overpayment of the Federal estate tax on the ground that the amount paid by way of inheritance tax to the State of California should have been allowed as a deduction from the gross estate. The executors of the estate, both of whom were citizens of the United States, acting under letters testamentary issued by the Superior Court of the State of California for the County of Los Angeles, filed a Federal estate-tax return under the Revenue Act of

1916, on April 19, 1918, and on the same day paid the amount of tax shown thereon. (R. 12.) On August 10, 1918, the Commissioner of Internal Revenue assessed an additional tax, which was paid on September 10, 1918. (R. 12.) The California inheritance tax was paid by the executors on October 23, 1918. (R. 13.) No deduction for this inheritance tax was made in the return filed or in the determination made by the Commissioner. (R. 13.)

The residuary legatees, respondents herein, were residents and citizens of Germany. (R. 12.) On June 12, 1918, the Alien Property Custodian, acting under the authority of the Trading with the Enemy Act of October 6, 1917, and the executive orders issued thereunder, notified the executors to convey, transfer, assign, deliver, and pay to him all the right, title, and interest of the residuary legatees in the estate. (R. 12, 17–19.) No further action was taken by the Alien Property Custodian until September 29, 1922, when he filed a petition in the Superior Court of the State of California in and for the County of Los Angeles, requesting distribution of the estate. (R. 13.) On October 26, 1922, the Court ordered distribution, and the residue of the estate, after payment of debts and specific legacies, was delivered and paid over to the Alien Property Custodian. (R. 13.) On or about the same date the executors, having rendered a final account, were discharged. (R. 12.)

On December 27, 1923, the residuary legatees filed claims for refund on the sole ground that cer-

tain assets included in the gross estate had been overvalued, and on January 31, 1924, the Alien Property Custodian filed a claim on the same ground. (R. 13.)

On November 23, 1925, the Commissioner of Internal Revenue was advised by letter on behalf of the residuary legatees and the Alien Property Custodian that refund was also claimed on the ground that the sum paid to the State of California by way of inheritance tax should have been allowed as a deduction from the gross estate for the purposes of the Federal estate tax. (R. 13.) On January 7, 1926, more than seven years after final payment of the estate tax, the Alien Property Custodian filed a formal claim for refund on the same ground. (R. 13, 20, 21.) This claim was rejected by the Commissioner on July 11, 1928, for the stated reason that under the laws of California the State inheritance tax is not a charge against the estate within the meaning of Section 203 of the Revenue Act of 1916. (R. 13–14.)

Suit was instituted by the residuary legatees on December 18, 1928. (R. 7.) The Court of Claims held on November 2, 1931, that the claim for refund filed by the Alien Property Custodian on January 7, 1926, was timely and that the residuary legatees were entitled to recover the sum of $23,563.03, which it ordered to be paid with interest to the Alien Property Custodian "to be administered according to law." (R. 14.) On January 26, 1932, respondents filed a motion for leave to file an

amended petition joining the Alien Property Custodian as a party plaintiff. On January 27, 1932, the Court of Claims allowed the motion, entered an order vacating its former judgment and rendered a judgment in favor of respondents. (R. 21.)

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred—

1. In holding that the Alien Property Custodian acquired immediate possession of the residuary legatees' interest in the estate by virtue of the notice to the executors dated June 12, 1918, in spite of the fact that he did not take physical possession of any part of the estate until 1922.

2. In holding that the enemy status of the residuary legatees prevented the executors from filing a claim for refund.

3. In holding that the refund claim filed by the Alien Property Custodian on January 7, 1926, was timely.

4. In holding that the inheritance tax paid to the State of California under the California Inheritance Tax Act of 1913 was a charge upon the estate within the meaning of Section 203 (a) (1) of the Revenue Act of 1916, which could be deducted from the value of the gross estate in determining the Federal estate tax.

5. In rendering judgment in favor of respondents.

SUMMARY OF ARGUMENT

I

Recovery of the alleged overpayment of the Federal estate tax is barred because no claim for refund was filed within the four-year period prescribed by the Revenue Acts. It does not appear that the residuary legatees ever filed a formal claim raising the question of the deductibility of the California inheritance tax now urged. The only formal claim raising this question was filed by the Alien Property Custodian on January 7, 1926, more than seven years after final payment of the tax.

The executors remained in office for more than four years after the tax had been paid. During that period they might have filed a claim. The notice and demand served upon them by the Alien Property Custodian under date of June 12, 1918, did not deprive them of this power, since that notice merely substituted the Custodian in the place of the alien enemy legatees. Nor were they under any disability with respect to seeking a refund by reason of the fact that the residuary legatees had no access to our courts. The executors represented the estate as a whole rather than any particular beneficiaries under the will. Their failure to file a claim in time conclusively barred any possible right to a refund.

If the foregoing contentions are correct, the question whether the statute of limitations runs against the Alien Property Custodian as an agent of the

Government is irrelevant, since the claim was barred prior to the time when he could have sought any refund. But in any event we believe that the statute of limitations applicable to tax refunds does run against the Custodian. When seeking a refund from the Government he is acting in behalf of the taxpayer and is governed by all the restrictions imposed on taxpayers generally. He is not, however, under a disability to sue in our courts by reason of the enemy status of the residuary legatees, since he was designated by the Government to hold enemy property.

II

The Revenue Act of 1916 permits the deduction from the gross estate only of charges that affect the estate as a whole and not those that affect solely the rights of individual beneficiaries. The California courts have declared that the State inheritance tax is imposed on the beneficiaries' right of succession. This interpretation of the State law must be accepted as controlling in this case. It has been recognized by this Court as a true statement of the character of the tax. Accordingly, respondents are not entitled to the deduction claimed.

ARGUMENT

I

THE CLAIM FOR REFUND FILED BY THE ALIEN PROPERTY CUSTODIAN ON JANUARY 7, 1926, WHICH FORMS THE BASIS FOR THIS ACTION, WAS BARRED BY THE STATUTE OF LIMITATIONS

The Court of Claims held that the claim for refund upon which this suit is predicated was not

barred by the statute of limitations. It reached this conclusion on the stated grounds that the executors could not have filed a claim during their tenure of office because they represented alien enemies who were denied access to our courts, and because the Alien Property Custodian had acquired possession and control of the residue of the estate as of June 12, 1918, and that the statute of limitations did not run against the Alien Property Custodian, because he was an officer or agent of the United States. It is our contention that the executors might have filed a claim, that they alone were the proper parties to do so, and that upon their failure to act within the four-year period prescribed by the statute the claim was conclusively barred. If we are correct in this contention, it is unnecessary to consider whether the statute of limitations runs against the Alien Property Custodian, inasmuch as the bar of the statute had fallen prior to the time when he obtained actual possession and control of the residuary estate. Nor is it necessary to consider whether the claims filed by the legatees on December 27, 1923, were timely, since they did not raise the question of the deductibility of the California inheritance tax now relied on as the ground for refund.

A. The Alien Property Custodian did not acquire such an interest in the estate prior to the discharge of the executors as to deprive the executors of the power to file a claim for the refund of taxes overpaid by them

Final payment of the estate tax was made by the executors on September 8, 1918. Consequently, the

time for filing a claim for refund expired on September 8, 1922, approximately six weeks prior to the date on which the executors were discharged after filing their final account in the probate court. Under the Treasury Regulations (*infra*, pp. 25–26) and the established administrative practice a claim for refund of estate taxes which have been overpaid must be filed by the executor or administrator. If no claim is filed by the legal representative of the estate, the persons beneficially interested in securing a refund may file claims to the extent of their respective interests. See Regulations 37 (1919 and 1921 revisions), Articles 106, 110, *infra*, pp. 25, 26. But it seems clear that if the statutory period has elapsed prior to the discharge of the executor or administrator and no claim has been filed the beneficiaries can not thereafter recover.

Respondents contend, however, that in the instant case the Alien Property Custodian had acquired such possession and control of the residuary estate as to deprive the executors of the right to file a claim for the refund of taxes which might ultimately inure to the benefit of the enemy aliens.

The question turns on the effect of the notice served by the Alien Property Custodian upon the executors under date of June 12, 1918. In this connection it is necessary to distinguish two classes of cases—those in which the Alien Property Custodian has served notice of claim and demand for transfer and delivery of specified property, either tangible or intangible, which belongs to or is being

held for the benefit of an alien enemy, and those in which the Custodian has given a similar notice and demand as to an interest, not definitely ascertained, in designated property where something remains to be done before the interest can be definitely ascertained or the property precisely identified. In the first type of case, the Custodian is entitled to immediate possession. *Central Union Trust Company* v. *Garvan,* 254 U. S. 554. The instant case, however, is of the second class. Here the notice given by the Custodian stated that (R. 18, 19)—

> I, A. Mitchell Palmer, Alien Property Custodian, * * * do determine that—
>
> Gertrude Luckhardt, * * * is an enemy (not holding a license granted by the President), and has a certain right, title, and interest in and to the estate of Rosa Von Zimmerman, deceased.
>
> I, as Alien Property Custodian, hereby require that every right, title, and interest of said enemy in and to the estate above described * * * shall be by you conveyed, transferred, assigned, delivered, and paid over to me, as Alien Property Custodian, * * * and that any money or property now or hereafter held by you which the enemy may at any time or times, now or hereafter, be entitled to receive either upon or without demand, shall at such time or times be conveyed, transferred, assigned, delivered, and paid over to me, as Alien Property Custodian. * * *

This notice and demand did not purport to identify any particular property as belonging to enemy aliens, but clearly recognized that the exact interest of the aliens was not yet capable of determination, and consequently it was intended to and did have the effect only of substituting the Custodian in the place of the residuary legatees and vesting in him the right to seize such property as they might thereafter be found entitled to receive. The delivery of possession to the Custodian was thus postponed until distribution by the executors and the approval of their accounts by the probate court. See *Kahn* v. *Garvan*, 263 Fed. 909 (S. D. N. Y.); *Miller* v. *Rouse*, 276 Fed. 715 (S. D. N. Y.); *Isenberg* v. *Trent Trust Company*, 26 F. (2d) 609 (C. C. A., 9th). The Custodian did not acquire possession, either actual or constructive, since there was no specific property which he could sequester. Nor did he purport to interfere with the executor's right of possession, or to control them in the administration of the estate as distinguished from its ultimate distribution. Despite the notice it was clearly contemplated and understood that they should continue to collect the assets, pay the debts, and perform all the usual functions of their office, subject only to the duty of paying over to the Custodian such property as would otherwise have been distributed to the residuary legatees at the time of final settlement. It appears that the Custodian did wait several years before pressing for the action

in the probate court which would permit distribution.

Pending such settlement, the Custodian had no greater rights than the residuary legatees would have had; he was merely a legatee under the will. *Miller* v. *Rouse, supra,* p. 716. As a legatee he had no standing before the Commissioner of Internal Revenue to secure a refund of taxes. The power and duty to file a refund claim remained in the executors until their discharge and was, we submit, in no way affected by the Custodian's notice to and demand upon the executors.

B. The disability of the residuary legatees to bring suits in our courts did not deprive the executors of the power to file a claim for refund

The executors in the instant case were citizens of the United States (R. 12) and as such clearly entitled to claim and sue for a refund, unless it be considered that the enemy character of the residuary legatees deprived the executors of access to the Commissioner of Internal Revenue.

The rule denying access by alien enemies to our courts is founded on the necessity of withholding all possible aid and comfort from the opposing forces. *Birge-Forbes Co.* v. *Heye,* 251 U. S. 317, 323. It has usually been invoked in the past as a reason for the suspension of the statute of limitations, in order to permit the alien to sue within a reasonable time after the cessation of hostilities. *Hanger* v. *Abbott,* 6 Wall. 532; *Freeborn* v. *The*

Protector, 9 Wall. 687. This Court said in the *Birge-Forbes Company case, supra* (p. 323):

> There is nothing "mysteriously noxious" (*Coolidge* v. *Inglee*, 13 Massachusetts, 26, 37) in a judgment for an alien enemy. Objection to it in these days goes only so far as it would give aid and comfort to the other side.

The defense of "alien enemy" is not favored by the courts. *Schaffenius* v. *Goldberg* (1916) 1 K. B. 284; *Society for the Propagation of the Gospel* v. *Wheeler*, Fed. Cas. No. 13156 (pp. 756, 763). There is no reason to assume that if a claim for refund had been filed such a defense would have been raised. We know of no instance of a rejection of a claim on this ground. The Government was adequately protected by reason of the fact that any and all property to which residuary legatees ultimately became entitled was taken over by the Alien Property Custodian and therefore could not have brought aid and comfort to the enemy. See *Weiditschka* v. *Supreme Tent Knights of Maccabees of the World*, 188 Iowa, 183, 191, 195.

The cases upon which respondents and the court below rely do not appear to us to be controlling. In *Borovitz* v. *American Hard Rubber Company*, 287 Fed. 368 (N. D. Ohio, E. D.), suit was brought by an administrator under the Ohio wrongful death statute to recover damages for the death of the intestate. The court held that since the beneficiaries were alien enemies the suit could not be maintained. It pointed out, however, that under the statute in

question an administrator was a mere nominal party, that his right to recover was measured by the rights of the beneficiaries, and that neither the creditors of the estate nor any other person except the next of kin had any interest in the fund recovered. See also *Weiditschka* v. *Supreme Tent of Knights of Maccabees of the World, supra; Dangler* v. *Hollinger Gold Mines,* 23 Dominion Law Reports, 384. In the case last cited the court expressed grave doubt as to whether the rule would apply if the administrator were seeking to recover an asset of the estate.

In *Crawford* v. *The William Penn,* Fed. Cas. No. 3372, the plaintiff was trustee for an enemy alien and was suing in his sole behalf, just as in the cases cited in the previous paragraph the plaintiffs were suing solely in behalf of the beneficiaries under the death statutes or life policies.

Here it seems clear that, regardless of who might ultimately benefit by the allowance of a refund, any claim that might have been filed by the executors would have been filed on behalf of the estate as a whole rather than on behalf of the residuary legatees. The executors should not, we submit, be regarded as trustees for the ultimate beneficiaries so as to bring them within the rule of the *Crawford case, supra.* To do so would be extending the rule of disability beyond the bounds of necessity and beyond the limits of the decided cases.

We know of no case in which the precise question under discussion has been presented. It is well

settled that a devise or bequest is not invalid because the devisee or legatee is an alien enemy. *In re Gregg's Estate,* 266 Pa. 189, certiorari denied *sub nom. Gregg* v. *Garvan,* 252 U. S. 588. And probate will not be denied merely because of the enemy status of one or more of the beneficiaries under the will. *Riddell* v. *Fuhrman,* 233 Mass. 69. The court will order that the enemy's share of the estate be held by the executor or administrator for the duration of the war, or that it be paid over to the officer of the United States designated to take custody of it. *Matter of Kelly,* 101 Misc. Rep. 495. Similarly, we submit, there should be no objection to permitting an executor who is a resident citizen of the United States to take such steps as may be necessary to collect assets of the estate merely because certain of the legatees are alien enemies. Accordingly, throughout the entire period before the statute of limitations ran, the executors could have filed a claim for refund and since they failed to do so, the right to refund (even if the claim would otherwise have been valid) was barred when the Custodian came into actual possession of the property of the residuary legatees in October, 1922.

C. Claims for refund filed by the Alien Property Custodian are subject to the usual limitations prescribed by the revenue acts

We contend, for the reasons previously stated, that the filing of a claim for refund was barred before the Custodian acquired possession of the prop-

erty of the residuary legatees, and that consequently the question whether the statute of limitations runs against the Custodian is irrelevant. But even if that question is involved, we submit that the decision of the court below on the point was erroneous.

Section 24 of the Trading with the Enemy Act, as amended by the Act of March 4, 1923, c. 285, 42 Stat. 1511, 1516, authorized the Alien Property Custodian to pay all taxes assessed against money or other property sequestered by him, but made no provision with respect to securing refunds of taxes overpaid by him or by the person who had control and possession of the property prior to its sequestration. This section was subsequently amended by Section 18 of the Settlement of War Claims Act of March 10, 1928, c. 167, 45 Stat. 254, 276, which made special provision in paragraphs (c) and (d) for determination of the tax on income derived from the sale or exchange of property held by the Alien Property Custodian, and provided further as follows:

> (f) The benefits of subsections (c), (d), and (e) shall be extended to the taxpayer if claim therefor is filed before the expiration of the period of limitations properly applicable thereto, or before the expiration of six months after the date of the enactment of the Settlement of War Claims Act of 1928, whichever date is the later. The benefits of subsection (d) shall also be extended to the

> taxpayer if claim therefor is filed before the expiration of six months after the return of the proceeds.

Paragraph (f), quoted above, was substituted in conference for an amendment proposed by the Senate, which would have permitted the filing of all refund claims at any time within six months after the enactment of the statute. The statement of the managers on the part of the House contains the following reference to this substitution (Congressional Record, 70th Congress, First Session, p. 3782):

> * * * The House recedes with an amendment providing * * * that the allowance of additional time for filing claims and for making assessments should apply only in cases where the tax liability is changed by the provisions of this section; * * *.

It seems clear, therefore, that Congress contemplated that claims for refund in respect of taxes paid on property owned by alien enemies must be filed within "the period of limitations properly applicable thereto," except in cases covered by paragraphs (c), (d), and (e) of Section 24 of the Trading with the Enemy Act as amended. The statute has been so interpreted in General Counsel's Memorandum 5000, VII–2 Cumulative Bulletin 176, where it was stated that the periods of limitation prescribed by the various Revenue Acts upon the refunding of taxes apply to claims filed by the

Alien Property Custodian except as otherwise specifically provided. See also General Counsel's Memorandum 4978, VII–2 Cumulative Bulletin 163. While the ruling of the General Counsel relates in terms to cases in which the tax was paid by the Alien Property Custodian himself, its reasoning is broad enough to cover a case such as this, where payment was made prior to the sequestration of the property.

The decisions cited by respondents (Brief in opposition to certiorari, pp. 29, 30) are not controlling. *Du Pont de Nemours & Co.* v. *Davis*, 264 U. S. 456, was a suit by the Director General of Railroads to recover for demurrage charges arising during the period of Federal control. This Court held that the action was in effect a suit by the United States in its governmental capacity, and was therefore subject to no time limitation. But here the Alien Property Custodian, although undoubtedly an agent of the Government in one sense, was, when seeking refund of taxes, acting primarily as the representative of the taxpayers. The prosecution of a claim for refund which, if successful, would result in the payment of money from the Treasury, would not be an act done in the interest of the United States in a strict sense unless it be said that fiscal interests were overridden by the interest of the United States in protecting the alien cestuis for whom the necessities of war required it to act as trustee. If he were regarded as an agent of the Government in this action, we should have the

anomalous situation of a claim made by the Government against itself.

This is not a case in which the application of the statute of limitations would cause the public interests to be prejudiced by the negligence of governmental officers, as in *United States* v. *Nashville &c., Ry. Co.*, 118 U. S. 120. The refund which the Custodian seeks to recover is a claim against the Government and, if granted, will inure to the benefit of the taxpayers. The reason which forms the basis for the rule that the statute does not run against the Government or its officers, is, therefore, not present in the instant case, and we submit that in the absence of a clear statutory provision and in view of the implication contained in the Trading with the Enemy Act, referred to above, the rule does not apply.

It may, perhaps, be suggested that if the Alien Property Custodian be regarded as the representative of the taxpayers, the statute of limitations should be suspended as to him on account of the disability of his principals. But the reasons for such disability do not obtain where the agent or trustee for the alien enemy is the person designated by the Government to hold the property of alien enemies during the period of hostilities. Clearly the Custodian does not partake of the disability of the residuary legatees. Otherwise he would have been unable to petition the probate court for distribution of the estate, as the facts show he did. We submit, therefore, that the running of the statute of limita-

tions against him was not suspended on this, or any other, ground.

Respondents annexed to their brief in opposition to the petition for certiorari a copy of a memorandum prepared by the Solicitor of Internal Revenue under date of June 13, 1924, holding that the claim filed by the Alien Property Custodian in the instant case was not barred by the statute of limitations. This ruling would appear to have been reversed by General Counsel's Memorandum 5000, *supra*. In any event, we submit that, for the reasons stated above, the reasoning upon which it is based can not be sustained.

II

THE CALIFORNIA INHERITANCE TAX WAS NOT DEDUCTIBLE FROM THE GROSS ESTATE FOR THE PURPOSE OF THE FEDERAL ESTATE TAX

Section 203 (a)(1) of the Revenue Act of 1916, *infra*, p. 24, under which the tax in the instant case was imposed, permits the deduction from the gross estate of sums constituting charges against the estate under the laws of the jurisdiction in which the estate is being administered. This Court has decided that charges against the estate are charges that affect the estate as a whole. Taxes assessed on the rights of succession of the individual beneficiaries are not deductible. *Leach* v. *Nichols*, October Term, 1931, No. 468, decided March 14, 1932; *New York Trust Company* v. *Eisner*, 256 U. S. 345, 350; *United States* v. *Woodward*, 256 U. S. 632, 635.

The character of the State tax is to be determined by reference to the decisions of the highest court of the State when such decisions are available, and the determination of the State court is controlling. *New York Trust Co.* v. *Eisner, supra; Keith* v. *Johnson,* 271 U. S. 1; *Leach* v. *Nichols, supra.*

The tax sought to be deducted was levied under the California Inheritance Tax Act of 1913, as amended. Cal. Stats. 1913, p. 1066; Cal. Stats. 1915, pp. 418, 435. The decisions of the highest court of the State leave no doubt that the tax imposed by that Act was a tax upon the beneficiary's right of succession and was not a charge upon the estate. *Estate of Kennedy,* 157 Cal. 517; *Estate of Hite,* 159 Cal. 392; *Estate of Miller,* 184 Cal. 674; *Estate of Potter,* 188 Cal. 55. In *Estate of Kennedy, supra,* the court said (p. 526):

> The provisions of our tax act clearly show that the tax imposed thereby is one solely upon the devisee, legatee, or heir, and one upon him only as to such property as he actually takes on distribution as devisee, legatee, or heir.

While the tax there under discussion was that provided for by the Act of 1905, there was no substantial difference between that Act and the Act of 1913 involved in this case. This Court has already recognized the California decisions as establishing that the inheritance tax prior to 1917 was a tax on succession. *Stebbins* v. *Riley,* 268 U. S. 137, 144.

It is true that in *Estate of Hite, supra,* it was held that the inheritance tax under the Act of 1905 was to be measured by the value of the estate at the time of the decedent's death. There certain assets of the estate had been misappropriated by the executor and the question was whether those assets were to be taken into account in computing the tax. The decision was rested upon the theory that the residuary estate vests in the beneficiaries at the instant of death, subject only to deductions for lawful expenses of administration. There is no necessary inconsistency between that case and the *Kennedy case, supra,* but if any doubt remained as to the character of the tax it is resolved by the more recent decision in *Estate of Miller, supra,* which expressly approved the characterization of the tax given in the *Kennedy case.*

The respondents rely on certain language contained in *Estate of Letchworth,* 201 Cal. 1, where it was said that the State inheritance tax is imposed on the transfer of property or on the right to succeed to property. While we do not concede that this language is in conflict with our position, it may be observed that the scope and effect of the California tax were substantially changed in the Acts of 1917 and subsequent years. See *Estate of Watkinson,* 191 Cal. 591, 595; *Stebbins* v. *Riley, supra,* p. 144. Whether this change affected the character of the tax is not material to the instant case, but if the *Letchworth case, supra,* be regarded as supporting

respondents' contentions, we submit it is not controlling, inasmuch as it arose under the Inheritance Tax Act of 1921.

The court below stated in its opinion that the California tax is not distinguishable from the Massachusetts inheritance tax, and relied upon its earlier decision in the case of *Merrill* v. *United States*, 66 C. Cls. 136. The *Merrill* case was clearly overruled by this Court in *Leach* v. *Nichols, supra*, which we submit is controlling here.

CONCLUSION

For these reasons we submit that the judgment of the Court of Claims should be reversed.

Respectfully submitted.

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APRIL, 1932.

APPENDIX A

FEDERAL STATUTES AND REGULATIONS

STATUTES

Section 203 of the Revenue Act of 1916, c. 463, 39 Stat. 756, 778, provides in part:

> SEC. 203. That for the purpose of the tax the value of the net estate shall be determined—
>
> (a) In the case of a resident, by deducting from the value of the gross estate—
>
> (1) Such amounts for funeral expenses, administration expenses, claims against the estate * * * and such other charges against the estate, as are allowed by the laws of the jurisdiction * * * under which the estate is being administered; * * *.

Section 1113 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 116, provides in part:

> SEC. 1113. (a) Section 3226 of the Revised Statues, as amended, is reenacted without change, as follows:
>
> "SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the

Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress."

Section 1316 of the Revenue Act of 1921, c. 136, 42 Stat. 227, 314, provides:

SEC. 1316. That section 3228 of the Revised Statutes is amended to read as follows:

"SEC. 3228. All claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, must be presented to the Commissioner of Internal Revenue within four years next after payment of such tax, penalty, or sum."

This section, except as modified by section 252, shall apply retroactively to claims for refund under the Revenue Act of 1916, the Revenue Act of 1917, and the revenue act of 1918.

This provision was reenacted, without change so far as is here important, by Section 1012 of the Revenue Act of 1924 (c. 234, 43 Stat. 253, 342) and by Section 1112 of the Revenue Act of 1926 (c. 27, 44 Stat. 9, 115).

REGULATIONS

Regulations 37 (1919 and 1921 revisions) provide in part:

ART. 106. *General provisions.*—Under these provisions of law two forms of relief

are afforded the executor in cases where he believes that an excessive amount of tax has been assessed against or paid by him, either upon the basis of the return or of the investigation conducted by the Bureau. The two forms of relief are:

(1) Claim for abatement on Form 47 where the tax has been assessed but not paid.

(2) Claim for refund on Form 46 where the tax has been paid.

* * * * *

ART. 110. *Claim for refund.*—Claims for refund of assessed taxes and penalties must be made on Form 46. In this case, as in the case of claims for abatement, the burden of proof rests upon the claimant. All the facts relied upon in support of the claim should be clearly set forth under oath. With the claim should be presented, in addition to the evidence:

(1) Collector's receipt evidencing payment of tax.

(2) Where the claim is made by the executor or administrator, a certified copy of the letters testamentary or of administration, and a certificate that the appointment remains in full force and effect.

(3) Where the executor or administrator has been discharged, a certified copy of the decree discharging him, and evidence as to the persons entitled to receive the refund, setting forth their names. Where the claim is made on behalf of a number of persons, there should be furnished a power of attorney duly executed by all the beneficiaries showing the claimant's authority to act in their behalf.

APPENDIX B

CALIFORNIA STATUTE

The California Inheritance Tax Act of 1913, Cal. Stats. 1913, pp. 1066, 1067, 1068, 1073, provides in part as follows:

> SEC. 2. A tax shall be and is hereby imposed upon the transfer of any property, real, personal or mixed, or of any interest therein or income therefrom in trust or otherwise, to persons, institutions or corporations, not hereinafter exempted, to be paid to the treasurer of the proper county, as hereinafter directed, for the use of the state, in the following cases:
>
> (1) When the transfer is by will or by the intestate or homestead laws of this state, from any person dying seized or possessed of the property while a resident of the state, or by any probate homestead set apart from said property.
>
> * * * * *
>
> SEC. 4. Such taxes shall be and remain a lien upon the property passed or transferred until paid, and the person to whom the property passes or is transferred, and all administrators, executors and trustees of every estate so transferred or passed, shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed.
>
> * * * * *
>
> SEC. 10. (a) Any administrator, executor, or trustee having in charge or trust any leg-

acy or property for distribution, subject to the said tax, shall deduct the tax therefrom, or if the legacy or property be not money he shall collect the tax thereon, upon the market value thereof, from the legatee or person entitled to such property, and he shall not deliver, or be compelled to deliver, any specific legacy or property subject to tax to any person until he shall have collected the tax thereon; and whenever any such legacy shall be charged upon or payable out of real estate, the executor, administrator, or trustee shall collect said tax from the distributee thereof, and the same shall remain a charge on such real estate until paid;

* * * * *

These provisions were not changed by the amendments of 1915, Cal. Stats. 1915, pp. 418, 435.

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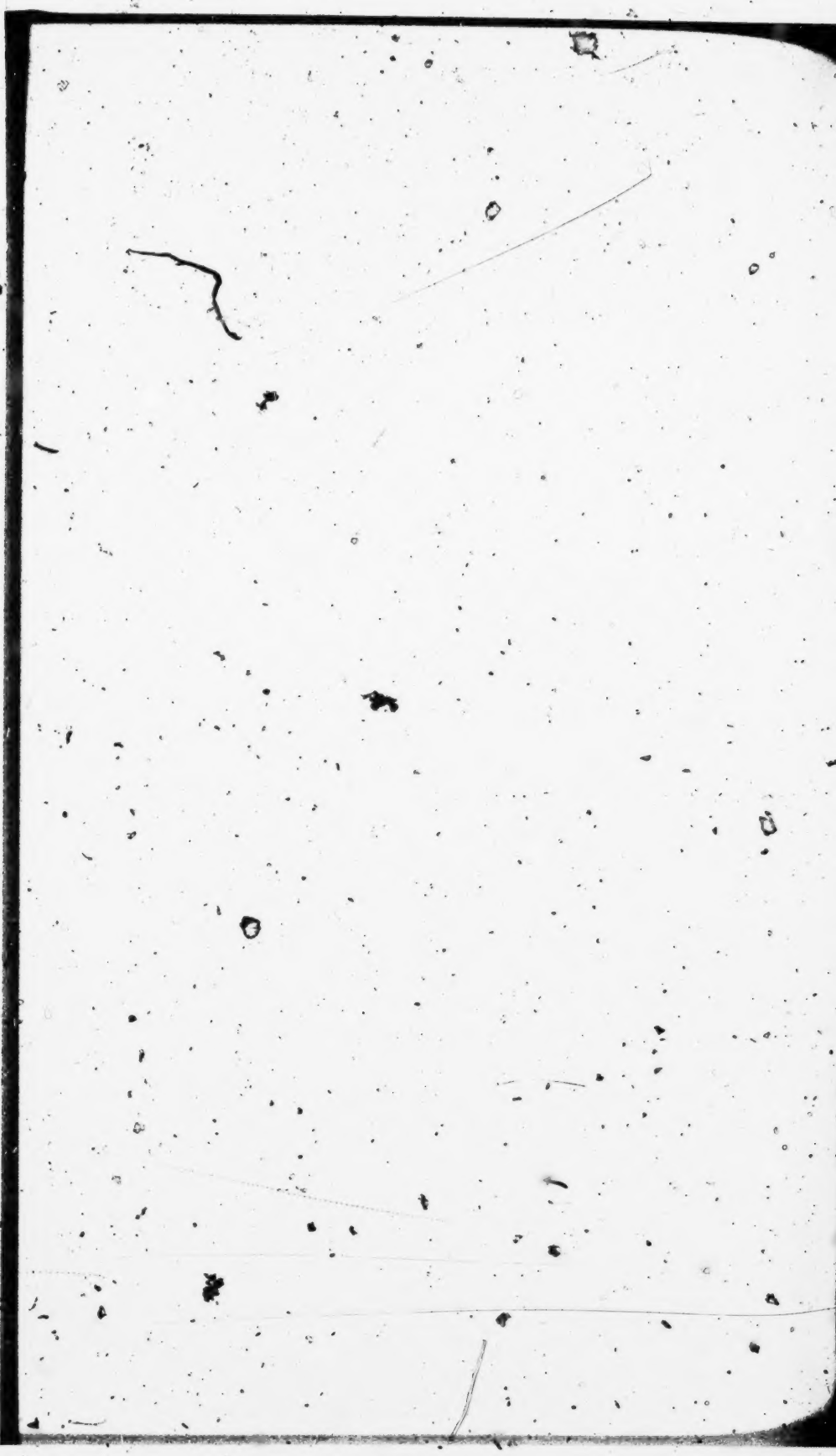

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MAR 9
CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 704.

THE UNITED STATES, *Petitioner*,

vs.

BARNIM KOMST, GERTRUDE LUCKHARDT AND ILKA WICHMANN, AND HOWARD SUTHERLAND, Alien Property Custodian.

BRIEF FOR RESPONDENTS.

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Supreme Court of the United States

OCTOBER TERM, 1931.

No. 704.

THE UNITED STATES, *Petitioner*,

vs.

BARNIM KOMST, GERTRUDE LUCKHARDT AND ILKA WICHMANN, AND HOWARD SUTHERLAND, Alien Property Custodian.

BRIEF FOR RESPONDENTS.

Deductibility of the California Inheritance Tax Under the Revenue Act of 1916 for Federal Estate Tax Purposes.

This is a suit to recover Federal estate taxes in the sum of $23,563.03, together with interest thereon, and the basis of the action is the refusal of the Commissioner of Internal Revenue to allow as a deduction from the gross estate in arriving at the net estate subject to tax the sum of $261,811.42 paid to the proper officers of the State of California as an inheritance tax under the laws of said State. The decedent, Rosa von Zimmermann, died on April 25, 1917, and Federal estate taxes were paid under the Revenue Act of 1916, as amended.

Section 203 (a) (1) of the Revenue Act of 1916 provides that the value of the net estate shall be determined by deducting from the value of the gross estate among others, "claims against the estate and such other charges against the estate, as are allowed by the laws of the jurisdiction * * * under which the estate is being administered; * * *."

It is earnestly contended that the California inheritance tax paid was a claim or charge against the estate, and is properly allowable as a deduction for Federal estate tax purposes under the Revenue Act of 1916.

The original inheritance tax act of California was the act of 1893. This act, as well as subsequent acts, was patterned after the New York Act. The acts of 1905, 1911 and 1913 were complete revisions. The estate of Rosa von Zimmermann, deceased, was subjected to the California inheritance tax act of June 16, 1913, as amended in 1915 (General Laws of California, Deering, 1915). This act in its essential features is identical with the New York acts. The pertinent provisions of the act of June 16, 1913, as amended in 1915, are as follows:

> "Sec. 2. The tax shall be and is hereby imposed upon the transfer of any property, real, personal or mixed, or of any interest therein or income therefrom in trust or otherwise, to persons, institutions or corporations, not hereinafter exempted to be paid to the treasurer of the proper county. * * *
>
> "Sec. 4. Such taxes shall be and remain a lien upon the property passed or transferred until paid, and the person to whom the property passes or is transferred, and all administrators, executors and trustees of every estate so transferred or passed shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed. * * * The tax so imposed shall be upon the market value of such property at the rates hereinafter prescribed and only upon the excess over the exemptions hereinafter granted; and provided, that in determining said

market value no deduction shall be made for any family allowance made out of said estate.

Sec. 6. This section imposes graduated rates on the market value of the property in excess of certain exemptions on the interest passed or transferred according to the value of the property transferred and the relationship of the person entitled to the beneficial interest in such property.

"Sec. 8. All taxes imposed by this Act, unless otherwise herein provided for, shall be due and payable at the death of the decedent, and if the same are paid within eighteen months, no interest shall be charged and collected thereon, but if not so paid, interest at the rate of 10 per cent per annum shall be charged and collected from the time said tax accrued; * * * but in all cases where the executors, administrators, or trustees do not pay such taxes within eighteen months from the death of the decedent, shall be required to give a bond in the form and to the effect prescribed in subdivision (a) of Section 9 of this Act for the payment of said taxes, together with interest.

"Sec. 10. (a) Any administrator, executor, or trustee having in charge or trust any legacy or property for distribution, subject to the said tax, shall deduct the tax therefrom, or if the legacy or property be not money, he shall collect the tax thereon, upon the market value thereof, from the legatee or person entitled to such property, and he shall not deliver, or be compelled to deliver any specific legacy or property subject to tax to any person until he shall have collected the tax thereon; and whenever any such legacy shall be charged upon or payable out of real estate, the executor, administrator, or trustee shall collect said tax from the distributee thereof, and the same shall remain a charge on such real estate until paid; if, however, such legacy be given in money to any person for a limited period, the executor, administrator or trustee shall retain the tax upon the whole amount; but if it be not in money he shall make application to the superior court to make an apportionment, if the case require it, of the sum to be paid into

his hands by such legatees, and for such further order relative thereto as the case may require.

"(b) All executors, administrators and trustees shall have full power to sell so much of the property of the decedent as will enable them to pay said taxes, in the same manner as they may be enabled by law to do for the payment of debts of the estate, and the amount of said tax shall be paid as hereinafter prescribed. * * *

"(c) Every sum of money retained by an executor, administrator or trustee or paid into his hands for any tax on property, shall be paid by him within thirty days thereafter to the Treasurer of the County in which the probate proceedings are pending.

"Sec. 11. Upon the payment to any county treasurer of any tax due under this act, such treasurer shall issue a receipt therefor in triplicate, one copy of which he shall deliver to the person paying the tax, and the original and one copy thereof he shall immediately send to the controller of state, whose duty it shall be to charge the treasurer so receiving the tax with the amount thereof, and said controller shall retain one of said receipts, and the other he shall countersign and seal with the seal of his office, and immediately transmit to the clerk of the court fixing such tax. And an executor, administrator or trustee shall not be entitled to credits in his accounts nor be discharged from liability for such tax, nor shall said estate be distributed unless a receipt so sealed and countersigned by the controller, or a copy thereof certified by him, shall have been filed with the court. Any person shall, upon payment to the county treasurer of the sum of fifty cents, be entitled to a duplicate, or copy, of any receipt that may have been given by said treasurer for the payment of any tax under this act."

The Courts of California have described the inheritance tax by various terms. The latest expression of the Supreme Court of California is contained in *Estate of Letchworth*, 201 Cal. 1, decided April 2, 1927, wherein it was stated, "the tax imposed by the inheritance tax statute is

on the transfer of the property or on the right to succeed to the proprty rather than on the property itself." This case arose under the California inheritance tax act of 1921, but that act so far as the character of the tax is concerned, is identical with the 1913 Act under which the estate of Rosa von Zimmermann was taxed.

There is no question but that a decision of a State court deciding whether or not a certain inheritance tax is a charge against an estate is entitled to great weight. But when a State court upholds the constitutionality of an inheritance tax act by stating that the tax is one on the right to transmit property, or on the right to receive property, or on both the right to transmit and receive property, such a decision affords little light in the judicial determination of whether or not the tax is a charge against the estate. The State reports are replete with decisions containing expressions descriptive of inheritance taxes, but such decisions are without value and inapplicable unless there was a controversy as to whether the tax was a charge against the estate.

Under the law of California the tax is not measured by the value of the property which the person actually receives. It becomes fixed as of the date of death and a certain portion of the property is contributed to the State. It was so held in the *Estate of Hite*, 159 Cal. 392, which is an authority entitled to weight. This case involved an appeal from an order fixing the amount of inheritance tax due under the Inheritance Tax Act (Stats. 1905, p. 341) from the various beneficiaries under the will of deceased. The appeal was by the residuary legatees and by the administrator with the will annexed. The lower court in fixing the amount of inheritance tax included in the valuation of the estate upon which the tax should be computed the sum of $98,991.10 left by the deceased, which had never come into the possession of the administrator with the will annexed, but which had been appropriated to his own use within a year of his appoint-

ment by the executor of the will of deceased. The whole of said sum of $98,991.10 was lost to the estate as the executor was without bond. The sole question in the case was whether the lower court's action is including the sum of $98,991.10 in the estate subject to tax was correct. The Court held that the amount was properly included. The Court, in the course of its opinion, said:

> "The exact question thus presented has apparently never before arisen in this or any other state. * * *
>
> "* * * We can perceive no warrant in the Inheritance Tax Act for holding that the destruction or loss of a part of the property before the actual delivery of possession to the beneficiary can affect the question of amount of tax, any more than would a material depreciation in its value affect it. * * * The residuary legatees here are seeking to take under the will of deceased all the residue of his property after the payment of debts, expenses of administration, and other legacies. We have here no question of the effect of a renunciation of a legacy. The residuary legatees are enforcing the provisions of the will in their favor. Under that will the residue of the estate vested in them at the instant of death of their testator, and the amount of succession tax which they are required to pay must be determined upon the conditions existing at that time. * * *
>
> "We see no force in the claim of the administrator with the will annexed that it cannot deduct the tax so far as the $98,991.10 is concerned from the other property in its hands which constitutes part of the residuum of the estate and belongs under the provisions of the will to the residuary legatees. The residuary legatees are bound to pay as a condition to receiving possession of the residue of the estate, a succession tax determined on the basis hereinbefore stated, and the administrator is expressly authorized and obligated to deduct the whole tax of any such legatee from the property in its possession belonging to him under the residuary clause of the will."

This decision demonstrates that under the law of California the inheritance tax is not one on a legatee on the value of property which he actually and physically receives on distribution, but one which attaches at the instant of death of the decedent, and is based on the value of the property at that time. The case actually decides that the tax is a charge against the estate, because if the executor had absconded with all the decedent's property excepting enough to pay the inheritance tax no different rule would apply.

This decision has the same legal effect as in *Re Hubbard,* 234 N. Y. 179, relied upon by the Supreme Court in *Keith v. Johnson,* 271 U. S. 1, where it was held that, "The transfer tax is imposed upon the estate of the decedent as it exists at the hour of his death, and its value is to be fixed as of that time." In *Keith v. Johnson, supra,* it was held that the New York transfer tax was deductible under the Revenue Act of 1916, and in *United States v. Mitchell,* 271 U. S. 9, it was held that the Texas inheritance tax was deductible under the Revenue Act of 1916.

In *Keith v. Johnson, supra,* Mr. Justice Butler, who delivered the opinion of the Court, said:

> "By indicating that the latest decisions of the State courts will be followed here as binding, it is not intended to intimate that a different view is entertained as to the construction properly to be given the state law. *In fact we agree with that construction*; and feel justified in so saying as the same question arises in another case—No. 470, the opinion in which is announced concurrently with this one—on a substantially similar statute of a state where there has been no authoritative construction by the state courts. . . ." (Italics ours)

In *United States v. Mitchell, supra,* decided concurrently with *Keith v. Johnson, supra,* holding the Texas inheri-

tance tax deductible under the Revenue Act of 1916, it is stated:

> "We are of the opinion that, in respect of the matter under consideration, the Texas inheritance tax law cannot be distinguished from the New York transfer tax law. * * *."

In *Lederer v. Northern Trust Co., et al.*, 262 Fed. 52, certiorari denied, 253 U. S. 487, it was held that the Pennsylvania inheritance tax was deductible under section 203 of the Revenue Act of 1916 in determining the value of the net estate subject to tax.

The subject of the deductibility of the Massachusetts inheritance tax for Federal estate tax purposes under the Revenue Act of 1916 was argued before this Court on February 23, 1932, in *Leach v. Nichols* (No. 468, October Term, 1931). This decision is in conflict with *Merrill v. United States*, 66 C. Cls. 136, in which the Court of Claims held that the Massachusetts inheritance tax is deductible under the Revenue Act of 1916.

In the case at bar, the authorities of the State of California obviously held the California inheritance tax to be a charge against the estate. The decedent, at the time of her death on April 25, 1917, was a German alien enemy resident in California. All the right, title and interest of the respondents, Barnim Kombst, Gertrude Luckhardt and Ilka Wichmann, in and to the estate of the decedent was seized by the Alien Property Custodian on June 12, 1918. These respondents were German alien enemies resident in Germany. The California inheritance tax was levied on the entire net value of the estate transmitted at death, notwithstanding the fact that their property was seized by the Government. In view of the existence of war between Germany and the United States, and the prevention of communication, the Germany alien enemy heirs had no knowledge of the inheritance of the property or the payment of the California inheritance tax.

The Claim for Refund is not Barred From Allowance by the Statute of Limitations.

While the claim for refund was filed more than four years after the tax was paid, this is a case which involves former German alien enemies, and it is a well established rule of law that where alien enemies are under a legal disability from asserting their rights, the period of the disability should be deducted from any general statute of limitations.

It is the contention of the respondents, Barnim Kombst, Gertrude Luckhardt and Ilka Wichmann, that there should be deducted from the four-year period of limitation, the time from the payment of the tax to March 4, 1923, the effective date of the Winslow Act, which for the first time restored any of these respondents' property rights, and further, that the four year period of limitation does not apply to the Alien Property Custodian.

Rosa von Zimmermann, at the time of her death on April 25, 1917, was a German alien enemy. By the terms of her will, the residue of her estate, after the payment of debts and certain legacies, was left to the aftermentioned respondents, who were German alien enemies resident in Germany. The residue of her estate vested in these respondents immediately upon her death on April 25, 1917. (*Estate of Hite,* 159 Cal. 392.) When the Alien Property Custodian, pursuant to the Trading with the Enemy Act, as amended, and the Executive Order dated February 26, 1918, made demand upon the executors on June 12, 1918, to convey, transfer, assign, deliver and pay to him all the right, title and interest of the plaintiffs in and to the estate of the decedent, such demand served to vest title to the residue of the estate in the Alien Property Custodian, who had all the powers of a common law trustee in respect to the same.

The Federal estate taxes which are the subject of this suit form a part of the residue of the estate, and the de-

mand of the Alien Property Custodian effectively covered the same. The California tax was paid on October 23, 1918, so that this cause of action did not accrue until after the seizure by the Alien Property Custodian. While the Alien Property Custodian has no right to seize property after the termination of the war, it has been held that where he made demand for property prior to the end of the war, he is entitled to receive such property after the war, because the demand served to give him title. It is for this reason that he is entitled to receive the amount of any recovery in this case. That the Federal estate taxes form a part of the residue of the estate and that there were ample funds with which to pay the debts and legacies to persons other than the plaintiffs herein is clear from the agreed statement of facts, because the residue of the estate was physically delivered to the Alien Property Custodian on October 26, 1922, the date on which the executors were discharged. After the Alien Property Custodian served his demand on the executors on June 12, 1918, the property of the enemy heirs was in the custody of the law, subject to the disposition of Congress. The executors had no right to prosecute a claim for refund of Federal estate taxes on behalf of the enemy heirs, because title to this fund was in the Alien Property Custodian, since it formed a part of the residue of the estate. Aside from this fact, it is maintained that no executor, adminstrator, guardian, trustee, or any other person, could prosecute during the period of the war any claim on behalf of an alien enemy. In the instant case, the executors could only assert the rights of the respondents, Barnim Kombst, Gertrude Luckhardt and Ilka Wichmann, and they had none with respect to the taxes erroneously collected until March 4, 1923. The petitioner argued that if there is any suspension of the four year period of limitation, it ended on July 2, 1921, the date fixed by the President's proclamation on November 14, 1921, as the termination of the war. It is agreed that this would be true under the decisions

if the property had not been seized or if the property rights had been restored on July 2, 1921. The property was seized on June 12, 1918, and the act of March 4, 1923, was the first to restore any of the property rights. Hence, March 4, 1923, should be assigned as the beginning of the operation of the statute. (*Farbwerke Vormals v. Chemical Foundation*, 283 U. S. 152; *Behn, Meyer & Co. v. Miller*, 266 U. S. 457; *United States v. Chemical Foundation*, 272 U. S. 1; *In re Sutherland*, 21 F. (2d) 667; *Thoms v. Sutherland*, 52 F. (2d) 592; *Sigg-Fehr v. White*, 285 Fed. 949; *Garvan v. $20,000 Bonds*, 265 F. 477; *Central Union Trust Co. of New York v. Garvan*, 254 U. S. 554; *Stoehr v. Wallace*, 255 U. S. 239; *Birge-Forbes Co. v. Heye*, 251 U. S. 317; *Commercial Trust Co. v. Miller*, 262 U. S. 51; *Swiss National Insurance Co. v. Miller*, 267 U. S. 42; *Great Northern Railway Co. v. Sutherland*, 273 U. S. 182; *Salamandra Ins. Co. v. New York Ins. & Trust Co.*, 254 Fed. Rep. 852; *Kohn v. Jacob & Josef Kohn, Inc., et al.*, 264 Fed. Rep. 253; *Garvan v. Marconi Wireless Telegraph Co.*, 275 Fed. Rep. 486; *Miller v. Schutte*, 287 Fed. Rep. 604; *Application of Miller*, 288 Fed. Rep. 760; *Munich Reinsurance Co. v. First Reinsurance Co.*, 6 F. (2d) 742; *Farmers' Loan & Trust Co. v. Hicks et al.*, 9 F. (2d) 848; *Sutherland v. Guaranty Trust Co. of New York*, 11 F. (2d) 696; *Hicks v. Anchor Packing Co.*, 16 F. (2d) 723; *Baltimore & Ohio R. Co. v. Sutherland*, 18 F. (2d) 560; *Sturchler v. Sutherland*, 19 F. (2d) 999; *In re Sutherland*, 23 F. (2d) 595; *Richmers Rhederei Actien Gesellschaft v. Sutherland*, 23 F. (2d) 989.) These cases construe the Trading with the Enemy Act, as amended, and are quite important in determining the rights and liabilities of alien enemies with respect to their property which had been seized.

Federal estate taxes in the amounts of $138,908.51 and $5,981.27 were paid by the executors to the Collector of Internal Revenue at Los Angeles, Calif., on April 19, 1918, and September 10, 1918, respectively.

On December 27, 1923, the respondents, Barnim Kombst, Gertrude Luckhardt and Ilka Wichmann, filed claims for refund on the ground that the gross estate was overvalued, and on January 31, 1924, the Alien Property Custodian filed a claim for refund on the same ground. There was included in the estate and on which tax was paid an item of $979,047.39 representing the value of certain Russian, Austrian and German securities as at the date of the decedent's death, which had depreciated to a paltry sum. It was felt that these securities were overvalued, but no substantial evidence could be secured, and the ground was abandoned. After these claims were filed, the Commissioner of Internal Revenue raised the question of the validity of the claims as they were filed after the four year period. The Solicitor of Internal Revenue (now General Counsel of the Bureau of Internal Revenue) in an opinion dated June 13, 1924, a copy of which is attached hereto as Appendix "A", held that the claims were not barred from allowance. These claims did not mention the ground which is the subject of this suit. However, on November 23, 1925, the Commissioner was advised by letter on behalf of the Alien Property Custodian and the other respondents that claim for refund was also made on the ground that the sum of $261,811.42 paid to the State of California for inheritance taxes should have been allowed as a deduction from the value of the gross estate in computing the net estate subject to the Federal estate tax. This served as an amendment of the prior claims and pointed out to the Commissioner a definite ground for refund. There can be no serious question but that this served as an informal claim for refund. (*Stern v. United States*, 31 F. (2d) 960; *Felt & Tarrant Mfg. Co. v. U. S.*, 283 U. S., 269). On January 7, 1926, a formal claim for refund was filed by the Alien Property Custodian based on the ground of the deductibility of the California inheritance tax. The Estate of Rosa von Zimmermann was re-

ferred to, and to all intents and purposes it was just as effective as if the heirs' names had been mentioned.

The claim was signed by the attorney in fact for both the Alien Property Custodian and the other respondents, which fact was well known to the Commissioner. Many thousands of dollars have been refunded on claims filed by the Alien Property Custodian since the Winslow Act of March 4, 1923. On July 11, 1928, the Commissioner rejected the claim for refund on the merits—not on the ground that the claim was filed after the four year period—and suit was instituted within the two year period. Since the rejection of the claim and while the suit was pending, the General Counsel of the Bureau of Internal Revenue recommended the allowance of the claim and a motion to dismiss was delivered to the Department of Justice to be held in escrow awaiting payment, but the Commissioner has now definitely refused to settle the case.

If there is deducted from the four year period for filing claims the time from the payment of the tax to effective date of the Winslow Act, March 4, 1923, then the claims on the ground of the deductibility of the California inheritance tax were filed in due time.

It is clear from the Trading with the Enemy Act, as amended, pertinent parts of which are set forth below, that the residue of decendent's estate became vested in the Alien Property Custodian upon his demand on June 12, 1918, and that the rights and remedies of the plaintiffs were absolutely suspended until the Act of March 4, 1923.

> "That the President is authorized to appoint, prescribe the duties of, and fix the salary * * * of an official to be known as the alien property custodian, who shall be empowered to receive all money and property in the United States due or belonging to an enemy, or ally of enemy, which may be paid, conveyed, transferred, assigned or delivered to said custodian under the provisions of this Act; and to hold, administer, and account for the same under the gen-

eral direction of the President and as provided in this Act. * * * (Act Oct. 6, 1917, c. 106, sec. 6, 40 Stat. 415.)

"Any person in the United States who holds or has or shall hold or have custody or control of any property beneficial or otherwise, alone or jointly with others, of, for, or on behalf of an enemy or allied enemy, * * * shall, with such exceptions and under such rules and regulations as the President shall prescribe, and within thirty days after the passage of this Act, or within thirty days after such property shall come within his custody or control * * * report the fact to the alien property custodian by written statement under oath containing such particulars as said custodian shall require. * * *

"Nothing in this Act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of enemy prior to the end of the war, * * *.

"(c) If the President shall so require any money or other property * * * owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the alien property custodian, or the same may be seized by the alien property custodian; and all property thus acquired shall be held administered and disposed of as elsewhere provided in this Act.

"The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered or paid over to the alien property custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the alien property custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the alien property custodian or by the Treasurer

of the United States. (Acts Oct. 6, 1917, c. 106, sec. 7, 40 Stat. 416; Nov. 4, 1918, c. 201, 40 Stat.)

"(c) The running of any statute of limitations shall be suspended with reference to the rights or remedies on any contract or obligation entered into prior to the beginning of the war between parties neither of whom is an enemy or ally of enemy, and containing any promise to pay or liability for payment which is evidenced by drafts or other commercial paper drawn against or secured by funds or other property situated in an enemy or ally of enemy country, and no suit shall be maintained on any such contract or obligation in any court within the United States until after the end of the war, or until the said funds or property shall be released for the payment or satisfaction of such contract or obligation: *Provded, however, that nothing herein contained shall be construed to prevent the suspension of the running of the statute of limitations in all other cases where such suspension would occur under existing law.* (Act Oct. 6, 1917, c. 106, sec. 8, 40 Stat. 418.)

"All moneys * * * paid to or received by the alien property custodian pursuant to this Act shall be deposited forthwith in the Treasury of the United States, and may be invested and reinvested by the Secretary of the Treasury in United States bonds or United States certificates of indebtedness, under such rules and regulations as the President shall prescribe for such deposit, investment, and sale of securities; and as soon after the end of the war as the President shall deem practicable, such securities shall be sold and the proceeds deposited in the Treasury.

"All other property of an enemy, or ally of enemy, conveyed, transferred, assigned, delivered, or paid to the alien property custodian hereunder shall be safely held and administered by him, except as hereinafter provided; * * *

"The alien property custodian shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this

Act, and, in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof * * *

"After the end of the war any claim of any enemy or of any ally of enemy to any money or other property received and held by the alien property custodian or deposited in the United States Treasury, shall be settled as Congress shall direct." (Acts Oct. 6, 1917, c. 106, sec. 12, 40 Stat. 423; March 28, 1918, c. 28, sec. 1, 40 Stat.)

It was prescribed in an Executive Order dated February 26, 1918, that,

"A demand for the conveyance, transfer, assignment, delivery, and payment of money or other property unless expressly qualified or limited shall be deemed to include every right, title, interest, and estate of the enemy in and to the money or other property demanded as well as every power and authority of the enemy thereover * * *. Where demand shall be made and notice thereof given, as hereinbefore provided, such demand and notice shall forthwith vest in the Alien Property Custodian such right, title, interest, and estate in and to the possession of the money or other property demanded and such power or authority thereover as may be included within the demand and the Alien Property Custodian may thereupon proceed to administer such money and other property in accordance with the provisions of the 'Trading with the enemy Act' and with any orders, rules, or regulations heretofore, hereby, or hereafter made by me or heretofore or hereafter made by the Alien Property Custodian."

The Act of March 4, 1923, amending the "Trading with the enemy Act," provides in part as follows:

"(b) In respect of all money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, if the President shall determine that the owner thereof at the time such money or other property was required to be so conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or at the time when it was voluntarily delivered to him or was seized by him was—

"(9) An individual who was at such time a citizen or subject of Germany, Austria, Hungary, or Austria-Hungary, or who is not a citizen or subject of any nation, State, or free city and that such money or other property, or the proceeds thereof, if the same has been converted, does not exceed in value the sum of $10,000, or although exceeding in value the sum of $10,000 is nevertheless susceptible of division, and the part thereof to be returned hereunder does not exceed in value the sum of $10,000: Provided, That an individual shall not be entitled, under this paragraph, to the return of any money or other property owned by a partnership, association, unincorporated body of individuals, or corporation at the time it was conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder, * * *

"The Alien Property Custodian is directed to pay to the person entitled thereto, from and after the time this section takes effect, the net income, dividend, interest, annuity, or other earnings, accruing and collected thereafter, on any property or money held in trust for such person by the Alien Property Custodian or by the Treasurer of the United States for the account of the Alien Property Custodian, under such rules and regulations as the President may prescribe; but no person shall be paid under this section, any amount in excess of $10,000 per annum."

(Act March 4, 1923, c. 285, sections 1 and 2, 42 Stat. 1511.)

The courts have uniformly held that the statute of limitations is suspended in the case of enemies from the

commencement of a war to its termination, because the action could not be prosecuted during this period.

This rule has been applied in cases where the debt or property has not been seized, because after the termination of the war the courts were again opened to the litigants. However, where the debt or property is seized by the Government, as in the instant case, the restoration of peace does not necessarily remove the disability created by war, unless the Government immediately passes legislation for the return of the property. In the instant case, the disability continued until the effective date of the Winslow Act, March 4, 1923, when certain property rights were restored to the plaintiffs. Under this act a former enemy was entitled to the return of principal not in excess of $10,000.00 and annual income not in excess of $10,000.00 under the settlement of war claims Act of 1928, a return of 80 per cent of the principal was provided for. The courts recognize that the period to be deducted from any general statute of limitation is the period of the disability. This rule is uniform and should be applied in this case.

In *Borovitz v. American Hard Rubber Co.*, 287 Fed. 368, it was held that the wrongful death statute of Ohio requiring an action to be brought within two years after the date of the death was suspended during the war where the beneficiaries were alien enemies, and it was further held that an American administrator could not have maintained this action on their behalf during the period of the war. The decedent met his death on June 28, 1917, while employed by the defendant. No administrator was appointed or qualified until peace was declared, and this action was commenced on October 25, 1922.

District Judge Westenhaver, who delivered the opinion of the Court, held that the action could be maintained, and stated:

> "My conclusion is that defendant's contention cannot be sustained. In my opinion, the alienage and

disabilities of the beneficiaries suspended the running of the statute, even in a case of this character, during the war period, and that the usual rule requires an exception to be read into section 10773—1, G. C., and excluding from computation the period of the war. * * *

"The authorities need not be reviewed. The general principles are fully and sufficiently set forth in Hanger v. Abbott, 6 Wall. 532, 18 L. Ed. 939. According to the principles of international law, an alien enemy is disabled during the war from seeking redress or communicating with this country; this disability suspends during the war both the right and the remedy; and an exception is, as a result of war, read into all general statutes of limitation to meet the disability created by war. It will be noted that the suspension is not merely of the remedy, but also of the right; that the alien enemy's debt and other property rights may be confiscated, seized, and impounded during a state of war; that the effect upon his right is the same as if it had been seized or impounded during the war and restored to him at the declaration of peace; and that the ordinary rule that a statute of limitations is suspended only when it pertains to the remedy, and is not a part of the right, has in this situation no basis upon which to rest."

In *Crawford et al. v. The William Penn*, Fed. Case No. 3,372, it was held that a trustee of an alien enemy could not maintain a suit during the legal disability of the enemy.

In *Sierra v. United States*, 9 Ct. Cls. 224, the Court said:

"The following language of the Supreme Court in the leading case of Hanger v. Abbott (5 Wall. p. 532) would seem to leave no room for further question on this point:

'Total inability on the part of an enemy creditor to sustain any contract in the tribunals of the other belligerent exists during war, but the restoration of peace removes the disability, and opens the doors

of the courts. Absolute suspension of the right, and prohibition to exercise it, exists during war by the law of nations, and if so, then it is clear that peace cannot bring with it the remedy if the war is of much duration, unless it also be held that the operation of the statute of limitation is also suspended during the period the creditor is prohibited, by the existence of the war and the law of nations, from enforcing his claim. Neither laches nor fraud can be imputed in such a case, and none of the reasons on which the statute is founded can possibly apply, as the disability to sue becomes absolute by the declaration of war, and is a conclusion of law. Ability to sue was the status of the creditor when the contract was made, but the effect of war is to suspend the right, not only without any fault on his part, but under circumstances which made it his duty to abstain from any such attempt.'

"We give the claimant's intestate the full benefit of this exposition of the law, though in her petition she avers that he aided, encouraged and abetted the rebellion.

"If, then, the limitation prescribed by the Act of March 3, 1863, was suspended during the period of the rebellion, the next point to be determined is the date at which it became operative as against this claim. This was settled by the Supreme Court in the case of The Protector (12 Wall. p. 700) where it was held that the date of the Proclamation April 2, 1866, was the close of the war in the States therein mentioned of which Florida was one. Hence we assign to that date the beginning of the operation of the statute."

In *Hanger v. Abbott,* 6 Wall. 532 (1868), the plaintiff, a resident of New Hampshire, brought suit against the defendant, a resident of Arkansas, in the sum of $10,000.00 for goods sold. The defendant contended that the action was barred, since it was brought more than three years after it accrued. The plaintiff replied that while the action accrued on October 25, 1859, the courts of the State

wherein the defendant resided were closed to him by reason of the rebellion from May 6, 1861, to January 1, 1865. The court held that the period of the disability should be deducted from the three year statute and allowed recovery to the plaintiff.

Mr. Justice Clifford, who delivered the opinion of the Court in addition to the language previously quoted from this case, said:

> " * * * Views of Mr. Wheaton are, and they are undoubtedly correct, that debts previously contracted between the respective subjects, though the remedy for their recovery is suspended during war, are revived on the restoration of peace, *unless actually confiscated in the meantime in the rigorous exercise of the strict rights of war*, contrary to the milder rules of recent times. He says, in effect, that the power of confiscating such debts theoretically exists, though it is seldom or never practically exerted; that the right of the creditor to sue for the recovery of the debt is not extinguished; that it is only suspended during the war, and revives in full force on the restoration of peace. * * *
>
> "Grant that the law of nations is that debts due from individuals to the enemy may, by the rigorous application of the rights of war, be confiscated, still it is a right which is seldom or never exercised in modern warfare, and *the rule is universally acknowledged, that if the debts are not so confiscated, the right to enforce payment revives when the war has terminated.* * * *
>
> "Where a doubt has not been confiscated, the rule is undoubted that the right to sue revives on the restoration of peace, and Mr. Chitty say that with the return of peace we return to the creditor the right and the remedy. *Unless we return the remedy with the right, the pretense of restoring the latter is a mockery, as the power to exercise it with effect is gone by lapse of time during which both the right and the remedy were suspended.*
>
> " * * * *Individual debts, as a general remark, are no longer the subject of confiscation, and the rule is*

universally admitted that if not confiscated during the war, the return of peace brings with it both 'the right and the remedy.'

"But the exception set up in this case stands upon much more solid reasons, as the right to sue was suspended by the acts of the government, for which all the citizens are responsible. Unless the rule be so, then the citizens of a state may pay their debts by entering into an insurrection or rebellion against the government of the union, if they are able to close the courts, and to successfully resists the laws, until the bar of the statute becomes complete, which cannot for a moment be admitted. Peace restores the right and the remedy, and as that cannot be if the limitation continues to run during the period the creditor is rendered incapable to sue, it necessarily follows that the operation of the statute is also suspended during the same period."

In *Freeborn v. The Ship Protector,* 9 Wall. 687 (1870), a motion was made to dismiss an appeal on the ground that it was not brought within the time allotted by law. A libel was filed January 25, 1859, in the Southern District Court of Alabama on behalf of appellants residents of New York City for the price of certain materials furnished the ship in the Port of New York. A decree dismissing the libel was pronounced in December, 1859. This decree was affirmed by the circuit court on April 5, 1861. An apeal to the Supreme Court was not taken until July 28, 1869, more than eight years after the decree appealed from. By the 22d section of the Judiciary Act of 1789, it was provided that appeals must be brought within five years.

Mr. Justice Bradley, who delivered the opinion of the court, said:

"It is plain that by the literal terms of the Act of 1789 the period of limitation had expired more than three years prior to the taking of this appeal. But this court has decided, in the case of Hanger v.

Abbott, 6 Wall. 532, 18 L. ed. 939, that a Statute of Limitations did not run, during the rebellion, against a party residing in New Hampshire, so as to preclude his remedy for a debt against a person residing in Arkansas, one of the insurrectionary States. It is unnecessary to go over again the ground which was examined in that case. We are of opinion that the same law applies to this. And by throwing out of the eight years which elapsed between the decree and the appeal the four years and more during which the war continued, the time is reduced to a period of less than five years.

"But it is urged that the Act of March 2d, 1867, has regulated this subject, and has prescribed a limitation of one year from the passage of that Act within which to bring all appeals and writs of error which were suspended or interrupted by the rebellion. The terms of the Act are 'that where any appeal or writ of error has been brought to the Supreme Court from any final judgment or decree of an inferior court of the United States for any judicial district in which, subsequently to the rendition of such judgment or decree, the regular sessions of such court have been suspended or interrupted by insurrection or rebellion, such appeal or writ of error shall be valid and effectual, notwithstanding the time limited by law for bringing the same may have previously expired; and in cases where no appeal or writ of error has been brought from any such judgment or decree, such appeal or writ of error may be brought within one year from the passage of this Act.' 14 Stat. at L. 545. We are of opinion that this statute is an enabling and not a restraining one; that it was not intended to take away any right of appeal, but to continue the right in cases where it had been lost. 'Where the common law and a statute differ,' says Blackstone, 'the common law gives place to the statute; and an old statute gives place to a new one. * * * But this is to be understood only when the latter statute is couched in negative terms, or where its matter is so clearly repugnant that it necessarily implies a negative.' 1 Bl. Com. 89. Such repugnancy does not exist here. Many cases may be supposed, in which the right of appeal

would be saved by the Statute of 1867, which would not be saved by the Act of 1789 and the operation of the common law rule followed in Hanger v. Abbott (*supra*). If four years of the five elapsed before the war, the right of appeal would be saved by the Act of 1867, but would be gone under the operation of the Act of 1789, unless the appeal were brought before the passage of the former Act. If Congress had intended to limit all appeals from courts in insurrectionary States to one year from the passage of the law it should have been so expressed in the Act."

In *Levy v. Stewart*, 11 Wall. 244 (1871), a suit was commenced on July 27, 1868, on certain notes all of which had matured in 1861. During the entire period of the rebellion from April 19, 1861, to August 20, 1866, the plaintiff resided in New York City and the defendant lived in Bayou Sara, Louisiana. The defendant claimed that the action was barred by the five year period of limitations, and further that the plaintiff still had time after the Rebellion came to an end to institute the suit within the five year period. The Court held, however, that the suit was brought in time as the period of the rebellion was to be deducted from the five year period.

Mr. Justice Clifford who delivered the opinion of the Court, said:

"Statutes of limitations exist in all the states, and with few exceptions they have been copied from the one brought here by our ancestors in colonial times. Story, Confl. L. par. 576. They are regarded as statutes of repose arising from the lapse of time and the antiquity of transactions, and they also proceed upon the presumption that claims are extinguished whenever they are not litigated in the proper forum within the prescribed period.

"Exceptions are to be found in all such statutes; but cases where the courts of justice were closed in consequence of insurrection or rebellion are not within the express terms of any such exception, contained

either in the original act or any other of later date.

"Express exceptions of the kind, it is conceded do not exist, and if none can be implied then all debts due from one belligerent to another, as well as executory contracts involving commercial intercourse with the enemy, are practically discharged, as, if the war is of much duration, prior claims will be barred by the local statute of limitations.

"Enemy creditors cannot prosecute their claims, subsequent to the commencement of hostilities, as the rule is universal and peremptory that they are totally incapable of sustaining any contract in the tribunals of the other belligerent.

"Absolute suspension of the right to sue and prohibition to exercise it exist during the war by the law of nations, but the restoration of peace removes the disability and open doors of the courts. * * *

"Peace, it is said, restores the right and the remedy, but it cannot restore the remedy if the war is of much duration, unless it be held that the operation of the statute of limitations is also suspended during the period the creditor is prohibited by the existence of the war and the law of nations from enforcing his claim. * * *

"Throughout the entire period between the dates of those proclamations the courts of the state were closed to the plaintiffs and they were totally incapable of instituting any suit for the enforcement of their claim. * * *

"Suppose that the rule of that court cannot be adopted, still it is insisted by the defendant that the suspension of the prescription ceased when the Rebellion came to an end; that the suit was instituted too late, as it might have been commenced within five years next after the cause of action accrued, and certain continental authorities are referred to where that rule is apparently maintained. 2 Troplong, De la Prescription, 258, etc.

"Authorities of the kind, though entitled to great respect, are not obligatory, and the court is of the opinion that the rule adopted in the case of Hanger v. Abbott, *supra*, is more consonant with justice and more in accordance with the analogies of our law

than the one suggested by those commentators. • • •

"*Where a debt has not been confiscated during war,* the rule is now universally acknowledged that the right to sue revives when peace is restored, and the rule is that the restoration of peace returns to the creditor both the remedy and the right, which necessarily implies that the law of limitation was suspended during the same period."

In *United States v. Wiley,* 11 Wall. 508 (1871), it was held that the whole period of the rebellion should be deducted from the statute of limitations in a suit by the United States on a bond. The cause of action accrued in 1860 and suit was not brought until February 15, 1869. The defendant was a resident of the State of Virginia. On June 11, 1864, Congress passed the following act:

"Wherever, during the existence of the present Rebellion, any action (civil or criminal) shall accrue against any person who, by reason of resistance to the execution of the laws of the United States, or the interruption of the ordinary course of judicial proceedings, cannot be served with process for the commencement of such action or the arrest of such person; or, whenever after such action (civil or criminal) shall have accrued, such person cannot, by reason of such resistance of the laws of such interruption of judicial proceedings, be arrested or served with process for the commencement of the action, the time during which such person shall be so beyond the reach of legal process, shall not be deemed or taken as any part of the time limited by law for the commencement of such action."

The defendant in error contended that the statute of limitations was only suspended after June 11, 1864, pursuant to the above act. The Court held, however, that the above statute did not change the common law, and allowed the deduction of the whole period of the rebellion.

Mr. Justice Strong, who delivered the opinion of the Court, said:

"The purpose of the act of 1864 was manifestly remedial, to preserve and restore rights and remedies suspended by the war. Hence it is entitled to a liberal construction in favor of those whose rights and remedies were, in fact, suspended. The mischief it sought to remove would be but half remedied were it construed as contended for by the plaintiffs in error. It is not, therefore, to be admitted that the intention of Congress was to prescribe a deduction only of the time which might elapse after the passage of the act, during which it might be impossible to serve a process. On the contrary, we are of opinion that the statute requires all the time to be deducted during which the suit could not be prosecuted by reason of resistance to the laws, or interruption of judicial proceedings, whether such time was before or after its passage. * * *"

The Courts of the United States have been quite liberal in dealing with its former enemies. The rule is well settled that where the property of an enemy is not confiscated and the termination of a war restores both the right and remedy, the date of the termination of the war begins the operation of the statute of limitations. However, in the instant case the termination of the war did not restore the right and the remedy, because the property had been seized and no rights were restored until March 4, 1923, and hence that date should be assigned as the beginning of the operation of the statute.

While the Alien Property Custodian might have prosecuted a claim for refund within the four year period, the respondents, Barnim Kombst, Gertrude Luckhardt and Ilka Wichmann, had no control over that officer and could not compel him to take action. He was only answerable to the President and Congress, and acted up until March 4, 1923, as the trustee of the United States. (32 Op. Atty. Gen. 249; *Adele Kahle*, 17 B. T. A. 633) At the time of the seizure of the property and prior to the Winslow Act of March 4, 1923, there was no assurance

that Congress would enact legislation for its return. If Germany had refused to set up machinery for the return of property which was seized from citizens of the United States, Congress would certainly have not legislated the return of the property seized from German nationals.

The Knox-Porter Resolution, declaring that the state of war with Germany had terminated with its passage as of July 2, 1931, incorporated as a part of the Treaty of Berlin, provided that:

> "All property of the Imperial German Government, or its successor or successors, and of all German nationals, which was, on April 6, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America * * * shall be retained by the United States of America and no disposition thereof made * * * until such time as the Imperial German Government * * * shall have * * * made suitable provision for the satisfaction of all claims * * * of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered * * * since July 31, 1914, loss, damage, or injury to their persons or property * * *."

It would have been useless for the executors to file a claim for refund prior to March 4, 1923, because they did not have the legal ability to prosecute the same owing to the disabilities of the respondents, Barnim Kombst, Gertrude Luckhardt and Ilka Wichmann, and the fact that title to the taxes erroneously collected comprising a part of the residue of the estate was wholly in the Alien Property Custodian until March 4, 1923.

In any event it is submitted that the claim for refund of the Alien Property Custodian is not barred from allowance, because he is a branch of the United States and the statute does not run against the United States in the absence of Congressional enactment clearly imposing it.

In *Du Pont de Nemours & Co. v. Davis, Director General of Railroads, as Agent,* 264 U. S. 456, it was held that an action by the Director General of Railroads to recover a liability owing by the defendant for demurrage charges during the period of Federal control was one on behalf of the United States in its governmental capacity, and is subject to no time limitation. Mr. Justice Sutherland, who delivered the opinion of the Court, said:

> "In taking over and operating the railroad systems of the country the United States did so in its sovereign capacity, as a war measure, 'under a right in the nature of eminent domain', North Carolina R. Co. v. Lee, 260 U. S. 16, 67 L. ed. 104, 43 Sup. Ct. Rep. 2; Missouri P. R. Co. v. Ault, 256 U. S. 554, 65 L. ed. 1087, 41 Sup. Ct. Rep. 593; Northern P. R. Co. v. North Dakota, 250 U. S. 135, 63 L. ed. 897, P. U. R. 1919D, 705, 39 Sup. Ct. Rep. 502, 18 N. C. C. A. 878; Re Tidewater Coal Exch., 280 Fed. 648, 649); and it may not be held to have waived any sovereign right or privilege unless plainly so provided. Moneys and other property derived from the operation of the carriers during Federal control, as we have seen, are the property of the United States (par. 12, 40 Stat. at L. 457, chap. 25). An action by the Director General to recover upon a liability arising out of such control is an action on behalf of the United States in its governmental capacity (Chesapeake & D. Canal Co. v. United States, 250 U. S. 123, 126, 63 L. ed. 889, 892, 39 Sup. Ct. Rep. 407; Re Tidewater Coal Exch. *supra*), and, therefore, is subject to no time limitation, in the absence of congressional enactment clearly imposing it (United States v. Nashville C. & St. L. R. Co., 118 U. S. 120, 125, 30 L. ed. 81, 83, 6 Sup. Ct. Rep. 1006; United States v. Whited & Wheless, 246 U. S. 552, 561, 62 L. ed. 879, 881, 38 Sup. Ct. Rep. 367). Statutes of limitation, sought to be applied to bar rights of the government, must receive a strict construction in favor of the government. United States v. Whited & Wheless, *supra.*"

In United States v. Nashville & Ry. Co., 118 U. S. 120, 125, it was held:

> "It is settled beyond doubt or controversy—upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided—that the United States asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound."

In taking over the property of alien enemies, the Alien Property Custodian did so in a sovereign capacity, as a war measure, and is still acting in a sovereign capacity with respect to seized property.

Congress has given its consent to be sued to recover taxes illegally collected. The machinery which was set up to accomplish this was full and effective. The Government collected taxes from both citizens and aliens. It was not the purpose of Congress to discriminate between them in providing a remedy to recover taxes illegally collected.

Section 1316 of the Revenue Act of 1921, providing for a period of four years for filing claims for refund was a general statute of limitations, which did not run against former enemies during the period of their legal disability or against the Alien Property Custodian. The term "all," used in this section, meant all claims that a taxpayer had. This is probably the reason for the rule that in the ordinary case all grounds for refund must be specified to the Commissioner within four years. Section 1316 does not specify who should file the claim for refund, but certainly the respondents in this case have a sufficient interest to prosecute a claim for refund. The Commissioner has since the Winslow Act of March 4, 1923, refunded thousands of dollars to the Alien Property Custodian covering taxes

illegally collected. Where an executor has been discharged, as in this case, it is recognized that a claim for refund may be filed by persons entitled to receive the refund. (Art. 109, Regulations 37)

Conclusion.

In conclusion, it is respectfully submitted that under the law, the four year period of limitation for filing a claim for refund of taxes illegally collected, was suspended with respect to the respondents, Barnim Kombst, Gertrude Luckhardt and Ilka Wichmann, from the time of the payment of the taxes on April 19, 1918 and September 10, 1918, until March 4, 1923, the date of the enactment of the Winslow Act, because any refund forms a part of their residuary estate which was seized by the Alien Property Custodian, and they were under a complete legal disability during this period, and that the four year period of limitation is inapplicable to the Alien Property Custodian.

Respectfully submitted,

CLARENCE W. DEKNIGHT,
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601 Hibbs Building,
Washington, D. C.

FREDERICK SCHWERTNER,
Of Counsel.

Dated at Washington, D. C., March 8, 1932.

APPENDIX "A".

COPY.

SOL:I:II
15-1-83

June 13, 1924.

In re: *Estate of Rosa von Zimmerman, deceased.*

DEPUTY COMMISSIONER ESTES:

Attention: Estate Tax Division.

Reference is made to your memorandum of March 16, 1924 (MT-ET-151-RRR), transmitting to this office the file in the above-entitled estate; the question at issue being whether the Alien Property Custodian is precluded by statute of limitations from obtaining the refundment of estate taxes paid by the executors of the decedent's will.

The facts are as follows:

The decedent, a resident of Los Angeles, California, died April 25, 1917. Her will provides that, after the payment of her debts, funeral expenses, the cost of administration and certain specific bequests, the remainder of the estate is to be divided equally among her three sisters, Frau Gertrude Luckhardt, Frau Ilka Wichmann and Frau Clara Kombst, who were and are citizens and residents of Germany. Walter F. Haas and Joseph Friedlander, residents of California, were nominated executors of the will. They qualified and performed their duties as such until October 26, 1922, when they were discharged. On April 19, 1918, they paid to the collector at Los Angeles the sum of $138,908.51, the amount of estate tax shown to be due by the return which had been filed by them. On June 12, 1818, A. Mitchell Palmer, as Alien Property Custodian, served written notice on the executors requiring them, under the Act of Congress approved October 6, 1917, and known as the "Trading with the enemy Act," to convey, transfer, assign and deliver to him as such Custodian all the right, title and interest of Gertrude Luckhardt, Ilka Wichmann and Clara Kombst in and to the estate of the decedent. The executors, however, continued with the administration of the estate, and on September 10, 1918, paid to the Collector an additional estate tax of $5,981.22. On September 29, 1922, Thomas W. Miller, Alien Property

Custodian, filed a petition in the proper court of California for distribution of the estate, and thereafter the part found to belong to the three named residuary legatees was delivered to him.

It is now claimed that the executors reported for tax certain of the assets at an excessive valuation, and, as a consequence, paid a larger tax than was rightfully due. Claims for the refunding of the alleged excess payment have been filed by the Alien Property Custodian and by the residuary legatees; the claim of the former having been filed February 1, 1924, and those of the legatees on December 27, 1923.

Under Section 3228 R. S., as amended by Section 1316 of the Revenue Act of 1921, all claims for refund of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any sum alleged to have been excessive, must be presented to the Commissioner within four years after payment of such tax or sum. Therefore, if this limitation of four years applies, the claims which have been filed in this instance cannot afford the basis of any refund, since their filing occurred subsequent to the expiration of the four-year period.

By Section 6 of the "Trading with the enemy Act," approved October 6, 1917, it is provided:

> "That the President is authorized to appoint, prescribe the duties of, and fix the salary * * * of an official to be known as the alien property custodian, who shall be empowered to receive all money and property in the United States due or belonging to an enemy, or ally of enemy, which may be paid, conveyed, transferred, assigned or delivered to said custodian under the provisions of this Act; and to hold, administer, and account for the same under the general direction of the President and as provided in this Act."

Section 7 provides, subject to exceptions not here applicable, that, "Nothing in this Act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of enemy prior to the end of the war * * *." Also, that,

"If the President shall so require, any money or other property owing or belonging to or held for, by, or on account of, or on behalf of, or for the benefit of an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing, or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the alien property custodian."

Subdivision (c) of Section 6 provides that:

"The running of any statute of limitations shall be suspended with reference to the rights or remedies on any contract or obligation entered into prior to the beginning of the war between parties neither of whom is an enemy or ally of enemy, and containing any promise to pay or liability for payment which is evidenced by drafts or other commercial paper drawn against or secured by funds or other property situated in an enemy or ally of enemy country, and no suit shall be maintained on any such contract or obligation in any court within the United States until after the end of the war, or until the said funds or property shall be released for the payment or satisfaction of such contract or obligation; *Provided, however,* That nothing herein contained shall be construed to prevent the suspension of the running of the statute of limitations in all other cases where such suspension would occur under existing law."

By Section 12 it is provided that all moneys paid to or received by the alien property custodian shall forthwith be deposited in the Treasury of the United States, and that,

"The alien property custodian shall be vested with all the powers of a common-law trustee in respect of all property, other than money, which shall come into his possession in pursuance of the provisions of this Act, and, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, may manage such property and do any acts or things in respect thereof

or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights which may be or become appurtenant thereto or to the ownership thereof, if and when necessary to prevent waste and protect such property and to the end that the interests of the United States in such property and rights or of such person as may ultimately become entitled thereto, or to the proceeds thereof, may be preserved and safeguarded."

It was prescribed in an Executive Order dated February 26, 1918, that—

> "A demand for the conveyance, transfer, assignment, delivery and payment of money or other property unless expressly qualified or limited shall be deemed to include every right, title, interest, and estate of the enemy in and to the money or other property demanded as well as every power and authority of the enemy thereover, * * * Where demand shall be made and notice thereof given, as hereinbefore provided, such demand and notice shall forthwith vest in the Alien Property Custodian such right, title, interest, and estate in and to the possession of the money or other property demanded and such power or authority thereover as may be included within the demand and the Alien Property Custodian may thereupon proceed to administer such money and other property in accordance with the provisions of the 'Trading with the enemy Act' and with any orders, rules, or regulations heretofore, hereby, or hereafter made by me or heretofore or hereafter made by the Alien Property Custodian."

The notice served by the Alien Property Custodian on the executors June 12, 1918, operated to divest the residuary legatees of, and to vest in the Alien Property Custodian, all their right, title, and interest in the estate. Whether he holds such interest as a trustee for the United States or for the residuary legatees is not necessary to be decided here. It is sufficient to say that he has had and now has the exclusive control and possession, and that such legatees have no interest in the estate, except that as

by an Act, approved March 4, 1923, and amending the 'Trading with the enemy Act', Congress has directed the Alien Property Custodian to pay to enemy aliens, in amounts not exceeding $10,000 in any one year, the net income, dividends, interest, and other earnings accruing on property taken from them by the Alien Property Custodian. But that amendment did not restore to such alien enemies any interest in the corpus of the estate seized by the Alien Property Custodian. Therefore, until Congress shall enact appropriate legislation, such alien enemies have no right or authority to demand and receive from the Alien Property Custodian or the United States property which, but for the Act, would have passed to them. It is, therefore, only necessary here to consider whether the refund claim filed by the Alien Property Custodian is subject to the bar interposed by section referred to, namely, section 1316.

In virtue of the maxim *nullum tempus occurit resi*, statutes of limitation do not, as a general rule, run against the sovereign or government. The rule, however, is otherwise where the government sues as a nominal party for the benefit of private persons. U. S. vs. Beebe, 127 U. S. 338; U. S. vs. Des Moines Nav. & R. Co., 142 U. S. 510; Curtner vs. United States, 149 U. S. 662. In the United States Ry. Co., 118 U. S. 120, it was held that a statute of limitations of a state did not affect the right of action of the United States upon negotiable bonds of a railroad corporation, purchased by the United States before maturity as an investment of money received from the sale of lands ceded to an Indian tribe, and held in trust for the tribe under treaty. Also in Trustees vs. Campbell, 16 Ohio St. 11, the holding was that the statute did not apply where the state was a trustee and the beneficiaries of the trust had no right to sue.

As stated in Levy v. Stewart, 11 Wall. 244, "Express exemptions of the kind, it is conceded, do not exist, and if none can be implied, then all debts due from one belligerent to another, * * * are practically discharged * * *. Enemy creditors cannot prosecute their claims subsequent to the commencement of hostilities, as the rule is universal and peremptory that they are totally incapable of sustaining any contract in the tribunals of the other belligerent. Absolute suspension of the right to sue and prohibition to

exercise it exists during the war by the law of nations, * * * the effect of war is to suspend his right during its continuance, not only without any fault on the part of the creditor, but under circumstances which make it his duty to abstain from any such attempt. His remedy * * * is suspended by the two governments and by the law of nations not applicable at the date of the contract, and which came into operation in consequence of an event over which he has no control."

In Brown v. Miatts, 15 Wall., 184, it is said:

> "Statutes of limitation, * * * proceed upon the principle that the courts of the country where the person to be prosecuted resides, or the property to be reached is situated, are open during the prescribed period to the suitor. The principle of public law which closes the courts of a country to a public enemy during war, renders compliance by him with such a statute impossible. As is well said in the recent case of Semmes v. Hartford Insurance Company (13 Wall. 160), "The law imposes the limitation and the law imposes the disability. It is nothing, therefore, but necessary legal logic that the one period should be taken from the other.'"

In Borovits v. American Hard Rubber Co., 287 Fed. 368, the court says, citing Hanger v. Abbott, 6 Wall. 332, that, "It will be noted that the suspension is not merely of the remedy, but also of the right, that the alien enemy's debt and other property rights may be confiscated, seized, and impounded during a state of war; that the effect upon his right is the same as if it had been seized or impounded during the war and restored to him at the declaration of peace; and that the ordinary rule that a statute of limitation is suspended only when it pertains to the remedy, and not a part of the right, has in this situation no basis upon which to rest."

On April 7, 1924, the Supreme Court held, in E. I. Du Pont De Nemours & Co. v. Davis, Director General of Railroads that the statute of limitations relied upon by the Du Pont Company did not apply, saying:

> "In taking over and operating the railroad system of the country the United States did so in its sover-

> eign capacity, as a war measure, * * *. An action by the Director General to recover upon a liability arising out of such control is an action on behalf of the United States in its governmental capacity, * * * and, therefore, is subject to no time limitation, in the absence of congressional enactment clearly imposing it. United States v. Nashville, etc. Ry. Co., 118 U. S. 120, 125; United States v. White and Wholess, 246 U. S. 552, 561. Statute of limitations sought to be applied to bar rights of the Government must receive a strict construction in favor of the Government. United States v. White and Wholess, *supra.*"

Considering the genesis and purpose of the Trading with the enemy Act, its provisions, and the authorities herein cited, it is held that the Alien Property Custodian is not debarred by the provisions of section 1316 from claiming and receiving a refund of any excess payment of estate taxes.

Counsel, in whose favor powers of attorney were granted by the Alien Property Custodian and the residuary legatees, was orally heard April 4, 1924.

(Signed) NELSON T. HARTSON,
Solicitor of Internal Revenue.

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Supreme Court of the United States

OCTOBER TERM, 1931.

No. 704

THE UNITED STATES, *Petitioner*,

vs.

BARNIM KOMBST, GERTRUDE LUCKHARDT, ILKA WICHMANN, AND HOWARD SUTHERLAND, Alien Property Custodian.

On a Writ of Certiorari to the Court of Claims.

BRIEF FOR THE RESPONDENTS.

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BRIEF FOR THE RESPONDENTS.

QUESTIONS PRESENTED.

1. Are the claims of the former alien enemy respondents barred from allowance by the four year period of limitations, when it is considered that all of their right, title and interest in and to the estate of Rosa von Zimmermann, deceased, was seized by the Alien Property Custodian on June 12, 1918, and any refund of estate taxes forms a part of their residuary estate which was seized? Congress first restored any of their property rights by the Winslow Act of March 4, 1923. If the period of their legal disabil-

ity June 12, 1918, to March 4, 1923, is deducted from the four year period, their claims were filed in due time.

2. Are the claims of the Alien Property Custodian barred from allowance?

3. Is the amount paid out of the estate to the State of California by the executors as the California inheritance tax on the estate a lawful deduction from the gross estate under Section 203 (a) (1) of the Revenue Act of 1916.

STATEMENT.

The decedent, Rosa von Zimmermann, at the time of her death on April 25, 1917, was a resident of California and a German alien enemy. She left a will making certain minor bequests, and devising and bequeathing all of the rest of her property to her three sisters, Klara Kombst, Gertrude Luckhardt and Ilka Wichmann, and in the event of the death of any, her share to go to her legal heirs. Klara Kombst died in Germany on August 16, 1917, leaving as her sole heir the respondent, Barnim Kombst. Klara Kombst at the time of her death was a German alien enemy, and the respondents, Barnim Kombst, Gertrude Luckhart and Ilka Wichmann were at all times during the World War alien enemies resident in Germany. In the decedent's will, she named two American executors.

The executors filed with the Collector of Internal Revenue at Los Angeles, California, a Federal estate tax return for the estate of the decedent, showing a net estate of $1,861,152.35, and tax due of $138,908.51, which was paid by the executors on April 19, 1918. The Commissioner of Internal Revenue increased the value of the net estate to $1,927,610.88 and assessed an additional tax of $5,981.27, which was paid by the executors on September 10, 1918.

On October 23, 1918, the executors paid to the proper officers of the State of California out of said estate an inheritance tax of $261,811.42. (R. p. 13)

On June 12, 1918, prior to the payment of the California

inheritance tax which gives rise to this action, the Alien Property Custodian pursuant to the Trading with the Enemy Act, approved October 6, 1917, and the Executive orders issued thereunder, served a notice and demand upon the executors to convey, transfer, assign, deliver and pay to him every right, title and interest of the enemy beneficiaries in and to the estate.

The authorities uniformly hold that a demand of this kind vests in the Alien Property Custodian legal title to the property demanded, and that the failure of the Alien Property Custodian to reduce the property to his possession immediately does not effect his legal title or dominion over the same.

On October 26, 1922, the Superior Court of California in and for the County of Los Angeles, having jurisdiction over the estate, entered an order distributing the estate in accordance with the decedent's will and after the payment of debts and bequests to persons other than the former alien enemy beneficiaries, the residue of the estate was delivered to the Alien Property Custodian.

The Winslow Act of March 4, 1923, which for the first time restored any rights with respect to property seized from German alien enemies, provided for a return of principal not in excess of $10,000.00, and annual income from the seized property not in excess of $10,000.00. The Settlement of War Claims Act of 1928 provided for a return of property not in excess of 80 per cent of its value.

On December 27, 1923, the alien enemy beneficiaries filed formal claims for refund, and on January 31, 1924, the Alien Property Custodian filed a formal claim for refund all on the ground that certain foreign securities and other property were overvalued.

On November 23, 1925, the Commissioner of Internal Revenue was advised by letter on behalf of the Alien Property Custodian and the alien enemy beneficiaries that claim for refund was also made on the ground that the

sum of $261,811.42 paid to the State of California for inheritance taxes should have been allowed as a deduction from the value of the gross estate in computing the net estate subject to the Federal estate tax.

On January 7, 1926, a formal claim for refund was filed with the Commissioner based on the contention that the sum of $261,811.42 paid to the State of California for inheritance taxes should have been allowed as a deduction from the gross estate of the said decedent in computing the net estate subject to the Federal estate tax. (R. p. 13) This claim was filed in the name of the Alien Property Custodian and the estate of Rosa von Zimmermann and was signed by the attorney in fact holding a power of attorney from the enemy beneficiaries and the Alien Property Custodian. (R. pp. 20-21)

On June 13, 1924, the Solicitor of Internal Revenue held that the original claims for refund were not barred by the statute of limitations. (Brief in opposition, p. 32)

On July 11, 1928, the Commissioner rejected the claim for refund on the ground that the California tax was not deductible. (R. p. 13) Suit was instituted in the Court of Claims on December 18, 1928.

ARGUMENT.

I.

The Claim for Refund is Not Barred by the Statute of Limitations.

The respondents have heretofore filed quite a lengthy brief, and therefore unnecessary repetitions will be avoided as much as possible.

The Federal estate taxes were paid on April 19, 1918, and September 10, 1918. The California tax was paid on October 23, 1918. The deductibility of this tax gives rise to the action herein. The German alien enemy respondents were entitled to the entire estate after the payment of debts and certain legacies.

On June 12, 1918, prior to the payment of the California tax, all the right, title, and interest of the German alien enemy respondents in and to the estate was seized by the Alien Property Custodian. (R. p. 12) The demand which was served was full and complete. (R. pp. 17-19) By this demand, the Alien Property Custodian did not merely acquire control and possession, but acquired legal title to the German alien enemy respondents' residuary estate, or any property that is properly a part of the residuary estate, or any income flowing from such seized property. (*Farbwerke Vormals v. Chemical Foundation*, 283 U. S. 152; *Great Northern R. Co. v. Sutherland*, 273 U. S. 182; *U. S. v. Chemical Foundation*, 272 U. S. 1; *Swiss National Insurance Co. v. Miller*, 267 U. S. 42; *Commercial Trust Co. v. Miller*, 262 U. S. 51; see other cases referred to in brief in opposition, p. 11.) The demands served in the instant case contained broad language, and the German alien enemy beneficiaries thereby became divested of their title to the corpus, and the title vested in the Alien Property Custodian. This is not a case where an American citizen claims any interest in seized property, or where there is any question as to identification of seized property. The fact that there was ample property to pay the debts and other legacies and the fact that the German alien enemy beneficiaries had a right, title and interest in the estate are illustrated by the actual delivery of the property seized to the Alien Property Custodian on October 26, 1922. (R. p. 13) All debts and legacies must be paid before any property is paid to residuary legatees or devisees. While the executors were not discharged until October 26, 1922 (R. p. 12), their activities in settling the estate certainly did not affect the title of the Alien Property Custodian to the property which he had seized. The demand which was served was a valid one. It was addressed to the executors who had custody of the estate, and it referred to the estate of the decedent. It named the

alien enemy who had an interest in the estate, and seized every right, title and interest of said enemy in and to the estate which the enemy may now and hereafter be entitled to receive. The nature of the demand was plain and unambiguous, and it described the specific property which was seized. In seizing stock, money or other property, it was not necessary for the Alien Property Custodian to specify the exact amount in order to make the seizure valid.

As all debts against the estate and other bequests were paid prior to the delivery of the German alien enemy respondents' residuary estate, any refund of Federal estate taxes forms a part of the residuary estate which was seized by the Alien Property Custodian on June 12, 1918, prior to the payment of the California tax.

In view of the fact that there was ample property in the decedent's estate to pay the debts and bequests to persons other than the German alien enemy respondents, any suit by the executors to secure a refund of taxes which would ultimately become a part of the residuary estate would certainly be in substance a suit on behalf of the residuary legatees and devisees who in this case were enemies. An executor is merely a nominal party who acts for the real parties in interest. The executors had no more right to prosecute a suit for the recovery of taxes which would ultimately become a part of the residuary estate than the alien enemies themselves, and they had no rights. (*Borovitz v. American Hard Rubber Co.*, 287 Fed. 368) Aside from this, they could not prosecute a suit for the recovery of the taxes, because the residuary estate, including any property which they may hereafter become entitled to, was seized by the Alien Property Custodian on June 12, 1918.

Congress by the Winslow Act of March 4, 1923, provided for a return of principal of seized property to a German alien not in excess of $10,000.00, and annual income not in

excess of $10,000.00. The Settlement of War Claims Act of 1928, provided for a return of principal not in excess of 80 per cent of the value.

The executors and the alien enemies were under a complete legal disability from prosecuting a claim for refund from the time of the payment of the California tax on October 23, 1918, until March 4, 1923, when Congress for the first time restored any of the alien enemies' property rights. (*Sturchler v. Sutherland*, 19 F. (2d) 999)

The four year period for filing a claim for refund is a general statute of limitations. (*Hills v. U. S.*, 55 F. (2d) 1001, 1002). It was designed to prevent laches on the part of taxpayers. In the Trading with the Enemy Act, the running of any statute of limitations with respect to certain commercial transactions was specifically suspended until after the war or until the funds or property shall be released, and it was also provided that nothing herein contained shall be construed to prevent the suspension of the running of the statute of limitations in all other cases where such suspension would occur under existing law. (Brief in opposition, p. 15) It is well settled that under the existing law a general statute of limitations is suspended with reference to an alien enemy for the period of the legal disability. (*Borovitz v. American Hard Rubber Co.*, 287 Fed. 368; *Hanger v. Abbott*, 5 Wall. 532; *Crawford et al. v. The William Penn*, Fed. Case No. 3,372; *Sierra v. United States*, 9 Ct. Cls. 224; *Freeborn v. The Ship Protector*, 9 Wall. 687; *Levy v. Stewart*, 11 Wall. 244; *United States v. Wiley*, 11 Wall. 508).

The period of disability in the instant case was longer than the duration of the war, as the property was seized and no rights were restored therein until March 4, 1923. In so far as the alien enemy respondents are concerned, the period of their legal disability continued from the time of the payment of the California tax on October 23, 1918, because the payment of this tax gives rise to the action

herein and prior to that date the residuary estate was seized by the Alien Property Custodian, to at least March 4, 1923, the date of the Winslow Act, and if this period of legal disability is deducted from the four year period of limitations, then the claims of the alien enemy respondents were filed in ample time.

Formal claims for refund were filed by the alien enemy respondents and by the Alien Property Custodian on December 27, 1923, and January 31, 1924, respectively, on the ground that certain foreign securities and other property were overvalued. On November 23, 1925, the Commissioner was advised by letter on behalf of the Alien Property Custodian and the alien enemy beneficiaries that claim for refund was also made on the ground of the deductibility of the California tax. This served as an amendment of the original formal claims for refund, and pointed out to the Commissioner another specific ground for the allowance of the claim. (*Tucker v. Alexander*, 275 U. S. 228; *Lasher v. United States*, 65 C. Cls. 295) The Government has not complained about the sufficiency of this amendment. The Commissioner had all of the necessary facts, and a question of law was presented by this amendment. A formal claim on the ground of the deductibility of the California tax was filed on January 7, 1926. This claim was in the name of the Alien Property Custodian and Estate of Rosa von Zimmermann and was signed by the attorney in fact holding a power of attorney from the alien enemy beneficiaries and the Alien Property Custodian. All powers of attorney are on file with the Court of Claims. The naming of the estate in the claim was equivalent to naming the alien enemy beneficiaries.

The alien enemy respondents concede that if there is any refund, it must be paid to the Alien Property Custodian, as that officer seized their property, and any refund is a part of their property. It is contended that the four year period of limitation is inapplicable to the Alien Property Custodian's claim for refund in the instant case.

In *United States v. Nashville & Ry. Co.*, 118 U. S. 120, 125, it is held:

> "It is settled beyond doubt or controversy—upon the foundation of the great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided—that the United States asserting rights vested in them as a sovereign government, are not bound by any statute of limitations, unless Congress has clearly manifested its intention that they should be so bound." (See also *United States v. White & Wheless*, 246 U. S. 552, 561.)

In *DuPont DeNemours & Co. v. Davis, Director General of Railroad*, 264 U. S. 456, 462, it is said:

> "In taking over and operating the railroad system of the country the United States did so in its sovereign capacity, as a war measure * * *. An action by the director general to recover upon a liability arising out of such control is an action on behalf of the United States in its governmental capacity, * * * and, therefore, is subject to no time limitation, in the absence of congressional enactment clearly imposing it."

In taking over the property of alien enemies, the Alien Property Custodian did so in a sovereign capacity, as a war measure, and in reducing to physical possession, property which he had seized during the war, he acts in a sovereign capacity, and is still acting as such.

The ex-enemy respondents could not have compelled the Alien Property Custodian to file a claim for refund during the four year period.

The Knox-Porter Resolution declaring war at an end on July 2, 1921, clearly showed that it was not the purpose of Congress to return property to German alien enemies until Germany made suitable provision to satisfy the claims of American citizens and there was no assurance prior to

March 4, 1923, that any property would be returned. At the time the claims for refund were filed, the property rights which were restored to the German alien enemies were merely those provided for in the Winslow Act of March 4, 1923. The disposition of seized property was dependent upon future legislation. When at the present time, the Alien Property Custodian reduces to physical possession, the corpus of property seized during the war, or the income from seized property, he is still acting in a sovereign capacity. There is no distinction from a strict legal standpoint between seized property in the hands of the Government or in the hands of a private citizen. The Alien Property Custodian is still reducing to possession property seized during the war, because the United States today is entitled in any event to retain 20 per cent of the value of the property. (*Thoms v. Sutherland,* 52 F. (2d) 592, decided Sept. 28, 1931)

General Counsel's Memorandum 4978, referred to by the petitioner, dealt with the statutory period for making an assessment. The Government was under no legal disability from making an assessment against an enemy or estate of an enemy or effecting collection, and furthermore if no return was filed, the statutory period has not run. General Counsel's Memorandum 5000 is contrary to Solicitor of Internal Revenue's decision dated June 13, 1924, in the instant case in which it was specifically held that the claim was not barred from allowance. (Brief in opposition, p. 32) Section 24, Trading with the Enemy Act, as amended by Section 18, Settlement of War Claims Act of 1928 (40 Stat. L., 411, as amended by 42 Stat. L., 1511, as amended by Public, No. 122, Seventieth Congress) established an orderly system of paying taxes by the Alien Property Custodian, and conferred certain benefits to ex-enemy taxpayers. The ex-enemy respondents in the instant case are not entitled to any of these benefits. The period of limitations for securing these benefits was extended by Section 24 (f). The legislative history re-

ferred to in the decisions of the General Counsel is not helpful to the petitioner's cause. As the Act conferred certain benefits and changed the tax liability of certain enemies, it was probably deemed unwise to legislate on the subject of the statute of limitations where no change was made in the tax liability. Furthermore, Congress knew of the provision in the Trading with the Enemy Act with respect to the suspension of the statute of limitations, and probably felt that it would be the best legislative policy to let existing law take care of the legal disability of certain ex-enemy taxpayers.

Judge Green of the Court of Claims participated in the decision of this case, and he was Chairman of the Ways and Means Committee at the time of the consideration of the legislation contained with Settlement of war claims Act of 1928.

The decision of the Court of Claims in the instant case was specifically called to the attention of the Ways and Means Committee of the House. (Hearings before the Committee on Ways and Means, 72nd Congress, 1st Session, p. 392) The Revenue Bill of 1932 which has passed the House does not contain any provision to avoid the effect of the decision of the Court of Claims in the instant case, thereby giving legislative approval to a judicial construction. Section 810 of the Revenue Bill of 1932 dealing with the period of limitations for filing a claim for refund of Federal estate taxes does contain language to avoid the effect of the decision of the Court of Claims in *Hills v. U. S.*, 55 F. (2d) 1001. The House probably felt that the decision in the Barnim Kombst case was consonant with justice and no legislation was required to alleviate the situation respecting the statute of limitations as applied to ex-enemy taxpayers.

II.

The California Inheritance Tax is Deductible Under the Revenue Act of 1916.

The argument supporting the deductibility of the California inheritance tax appears in the brief in opposition. It is contended that the decisions of this Court in *Keith v. Johnson,* 271 U. S. 1, and *U. S. v. Mitchell,* 271 U. S. 9, allowing the New York and Texas inheritance taxes as deductions, control the instant case. This Court in the above cases, speaking through Mr. Justice Butler, has laid down certain standards in determining whether the inheritance tax is a charge against the estate. In the decision of *Keith v. Johnson, supra,* it is said:

> "The transfer tax law imposes a tax 'upon the transfer of property' from the deceased at rates graduated according to the amount transferred to each beneficiary and the relationship, or absence of any, between the deceased and beneficiaries. Until paid the tax is a lien upon the property of the deceased. The person to whom the property is transferred is made personally liable for the tax. The personal representatives of the deceased are personally liable for the tax until its payment; they are authorized to sell the property of the estate to obtain money to pay the tax in the same manner as they may to pay debts of the deceased. They are not entitled to discharge until the tax is paid. The law plainly makes it their duty to pay the tax out of the estate. The property remaining passes to the beneficiaries. When property is transferred without the deduction of the tax the beneficiary is required to pay. But by whomsoever the amount may be handed over to the state, the tax is in effect an appropriation by the state of a part of the property of the deceased at the time of death. And the state's portion is deductible from the legacy and does not pass to the legatee. If money is transferred the tax is withheld; property other than money passes subject to the transfer tax."

An examination of the California inheritance tax act of June 16, 1913, under which the estate in the instant case was taxed will show that all of the above elements are present in the California Act. (Brief in opposition, p. 2) In the respondent's brief, Appendix B, several material portions of the California inheritance tax which are important in determining whether the tax is a charge against the estate are omitted, such as Section 8 which makes the tax due and payable at the death of the decedent and requires the executor to give bond for the payment of the tax if he fails to pay within eighteen months, Section 10 (b) which authorizes an executor to sell so much of the property of the decedent as will enable him to pay the taxes in the same manner as property of a decedent is sold to pay the debts of the estate, and Section 11 which provides that an executor shall not be entitled to a credit in his account nor be discharged from liability, nor shall the estate be distributed until a receipt for the payment of the taxes shall be filed with the Court. These provisions make the California tax unlike that of Massachusetts, and the instant case is distinguishable from *Leach v. Nichols,* 76 L. ed. p. 453, decided by the Supreme Court on March 14, 1932, holding the Massachusetts tax not deductible.

In *Leach v. Nichols, supra,* it was said:

> "The Massachusetts statute by plain words places the real burden of the tax upon the legatee or other person who receives a decedent's property. Payments required of an executor are only preliminary; ultimately they must be met by the beneficiaries. * * * The thing burdened is the right to receive."

In the instant case, after the payment of debts and certain minor bequests, all of the decedent's property was left to the alien enemy respondents. They had no right to receive, because they were German alien enemies resident in Germany and knew nothing of the death of the decedent which occurred on April 25, 1917, soon after the declaration of war against Germany. It would have been

unlawful for them to communicate with this country. They could not pay the tax if they wanted to. Furthermore all of their right, title and interest in and to the estate was seized by the Alien Property Custodian on June 12, 1918.

Under Section 10 (b) of the California Act of 1913, the executors could pay the taxes in the same manner as they were enabled by law to pay the debts of the estate. Certainly debts are charges against an estate. The California tax due on the estate was fixed at the instant of death, and due and payable at the time of death. Irrespective of whether the ex-enemy respondents ever received a penny out of the estate would not affect the amount owing on the same as the California tax. That the executors paid the tax and paid it out of the estate of the decedent is clear from the finding of fact made by the Court of Claims. (R. p. 13)

The latest expression of the Supreme Court of California as far as we have been able to discover descriptive of the California tax is contained in *Estate of Letchworth*, 201 Cal. 1, decided April 2, 1927, wherein it was said:

> "It is well settled in this state, as well as in other jurisdictions where the laws provide for the collection of an inheritance tax, that the tax imposed by the inheritance tax statute is on the transfer of the property or on the right to succeed to the property rather than on the property itself. * * *
>
> "It must be apparent, we think, from the provisions of the statute above quoted that the tax is only imposed upon the transfer of the excess over the exemptions and paid upon the remainder of the property after deducting the exemptions."

This case unequivocally holds that the California inheritance tax is a transfer tax. It is not one solely upon the devisee, legatee, or heir, and one upon him only as to such property as he actually takes on distribution as devisee, legatee, or heir, as quoted from *Estate of Kennedy*, in the respondent's brief. In the *Kennedy* case, it was held that

under the Tax Act of March 20, 1905, property of a decedent set apart absolutely as a homestead by the Court in probate under the provisions of Section 1465 of the Code of Civil Procedure, and moneys paid under order of the probate court under section 1466 of the Code, do not pass by will or by the intestate laws of the State, and are not subject to tax.

The California tax is certainly not one solely on the legatee as to such property as he actually takes on distribution, for in the *Estate of Hite,* 159 Cal. 392 (quoted at length in brief in opposition, pp. 5-7), it was held that the California tax attaches at the instant of death based upon the value at date of death, and attached to property left by the decedent even though the executor who served without bond appropriated $98,991.10 to his own use and the residuary legatees never received this money. This decision has the same legal effect as in *Re Hubbard,* 234 N. Y. 179, relied upon by the Supreme Court in *Keith v. Johnson,* 271 U. S. 1, where it was held that, "The transfer tax is imposed upon the estate of the decedent as it exists at the hour of his death, and its value is to be fixed as of that time."

In the decision of *New York Trust Co. v. Eisner,* 256 U. S. 345, the Supreme Court relied upon *Re Gihon,* 169 N. Y. 443, 62 N. E. 561, which held the New York transfer tax to be a succession tax. In *Keith v. Johnson,* 271 U. S. 1, holding the New York transfer tax deductible under the Revenue Act of 1916, this Court relied upon *Home Trust Co. v. Law,* 204 App. Div. 590 and Re Hubbard, *supra.*

In *Estate of Miller,* 184 Cal. 674, it was held that the Federal estate tax due under the Act of 1916 and the Nevada inheritance tax upon stock in a Nevada corporation were deductible in determining the California tax in the case of a resident of California.

In *Estate of Potter,* 188 Cal. 55, it was held that a gift of property made on October 22, 1908, was subject to the

tax in force at that time and could not be subjected to the tax in force at the time of decedent's death in 1916. It was said in that case (p. 59):

> "It is settled law that the tax is levied on the transfer of title, or on the exercise of the right to transfer the title, including of course, the right of the transferee to receive it, and not on the property itself. * * *
>
> "It is also settled that the right to such a tax vests in the State at the date of the taxable transfer. * * *"

It is clear from the law of California that the inheritance tax attaches at the instant of death and is measured by the value at the date of the decedent's death. It is payable out of the property in the hands of the executor and not out of the property which a legatee receives. The legatee by reason of depreciation in the value of the property, or wrongful appropriation, may not receive a penny on distribution, but nevertheless the tax is payble by the executor measured by the value at the date of death. In the instant case, the ex-enemy respondents did not receive a penny on distribution. Under Section 10 (b) of the California inheritance tax act, the executors had the right to sell so much of the property to pay the tax just as they had in the case of debts of the estate. The California tax is just as much a charge against the estate as a debt left by the decedent.

CONCLUSION.

In conclusion, we submit that the judgment of the Court of Claims should be affirmed.

Respectfully submitted,

CLARENCE W. DEKNIGHT,
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Of Counsel,
FREDERICK SCHWERTNER.

Dated at Washington, D. C., April 20, 1932.

CORRECTED COPY.

SUPREME COURT OF THE UNITED STATES.

No. 704.—October Term, 1931.

The United States of America, Petitioner,
vs.
Barnim Kombst, et al

On Writ of certiorari to the Court of Claims
~~On Certiorari to the Circuit Court of Appeals for the Ninth Circuit.~~

[May 23, 1932.]

Mr. Justice Brandeis delivered the opinion of the Court.

The question for decision is whether the sum of $261,811.42 paid to the State of California for inheritance taxes should have been deducted from the gross estate of the decedent before calculating the Federal estate tax under the Revenue Act of 1916, as amended.

On April 25, 1917, Rosa von Zimmermann died in California, a German alien enemy, leaving a net estate valued at $1,927,610.88. Her will was probated there. Her executors, who were citizens of that State, paid in 1918 to the United States an estate tax of $144,889.78, and to California for inheritance taxes the sum of $261,811.42. In the same year, the Alien Property Custodian served notice and demand upon the executors to convey and pay over to him all interest, in the estate, of the residuary legatees, who were likewise German alien enemies. In 1922, the executors, having rendered a final account and turned over the residue of the estate to the Alien Property Custodian, were discharged. After March 4, 1923, the effective date of the Winslow Act, 42 Stat. 1511, c. 285, a claim for refund was filed with the Commissioner of Internal Revenue by Barnim Kombst and the other residuary legatees. One of the grounds assigned was that the sum paid to California by way of an inheritance tax should have been deducted from the gross estate before calculating the Federal estate tax. Subsequently, the Alien Property Custodian filed a like claim. The Commissioner rejected both claims. Thereupon, the legatees and the Alien Property Custodian brought this action in the Court of Claims to recover the amount alleged to have been wrongfully exacted. The court sustained their contention, and allowed recovery of $23,563.03, with interest. 52 F. (2d) 1030. Certiorari was granted, 285 U. S. —. The Government contends that the sum paid to California was

not deductible; and that even if it should have been deducted, there can be no recovery, because the claim for refund was not made within the period allowed by law.

The Revenue Act of 1916, § 203 (a) 1, under which the excise tax is laid, does not allow as a deduction from the gross estate a sum paid by way of succession tax, as distinguished from an estate tax.[1] *Leach* v. *Nichols*, 285 U. S. —; *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 350. Compare *United States* v. *Woodward*, 256 U. S. 632, 635. Whether the California tax was a succession tax or an estate tax is to be determined by reference to the decisions of its highest court. *Leach* v. *Nichols, supra; Keith* v. *Johnson*, 271 U. S. 1, 8. The California tax was levied under the Inheritance Tax Act of 1913, Cal. Stats. 1913, p. 1066, as amended, Cal. Stats. 1915, pp. 418, 435. This Act differs in no substantial respect from its predecessors, Cal. Stats. 1905, p. 341, and Cal. Stats. 1911, p. 713, which have uniformly been held by the Supreme Court of the State to impose a tax upon the succession. *Estate of Kennedy*, 157 Cal. 517, 523; *Estate of Hite*, 159 Cal. 392, 394; *Estate of Miller*, 184 Cal. 674, 678. Compare *Estate of Potter*, 188 Cal. 55; *Estate of Letchworth*, 201 Cal. 1. See *Stebbins* v. *Riley*, 268 U. S. 137, 144.

It is urged that the original and all later California inheritance tax acts were patterned after the New York Act; and that, under the New York Act, the tax is one upon the transfer. *Keith* v. *Johnson*, 271 U. S. 1. Compare *United States* v. *Mitchell*, 271 U. S. 9. As the highest court of California has construed its statutes as laying a succession tax, we have no occasion to consider the construction given by the courts of New York to its legislation. Compare *Stonebraker* v. *Hunter*, 215 Fed. 67, 69.

The Commissioner properly refused to allow as a deduction the amount paid to the State. We have, therefore, no occasion to consider the question whether the claim for refund was filed in time.

Reversed.

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[1] Act of September 8, 1916, 39 Stat. 756, 778, c. 463: "Sec. 203. That for the purpose of the tax the value of the net estate shall be determined—

"(a) In the case of a resident, by deducting from the value of the gross estate—

"(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages . . . . and such other charges against the estate, as are allowed by the laws of the jurisdiction . . . under which the estate is being administered. . . ."